Jurisdictional Statement

81-669

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SHEPHERD CONSTRUCTION CO., INC.,
DAN P. SHEPHERD AND J. HAROLD SHEPHERD,

Appellants,

v.

STATE OF GEORGIA,

Appellee.

ON APPEAL FROM THE
SUPREME COURT OF GEORGIA

JURISDICTIONAL STATEMENT

DAVID H. FLINT
WARREN O. WHEELER
Counsel of Record
MARY JO WORKMAN
Schreeder, Wheeler & Flint
1600 Candler Building
Atlanta, Georgia 30043-7501
(404) 681-3450
Counsel for Appellant Shepherd Construction Co., Inc.

MARVIN ARRINGTON
JOHN J. GOGER
Arrington, Rubin, Winter
Krischner & Goger, P.C.
1210 First National Bank Tower
Atlanta, Georgia 30383
(404) 658-9977
Counsel of Record for Appellant
Dan P. Shepherd

CHARLES H. HYATT
201 Trust Building
505 North McDonough Street
Decatur, Georgia 30030
(404) 378-3634
DAVID R. ROGERS
212 Trust Building
505 North McDonough Street
Decatur, Georgia 30030
(404) 377-0411
Counsel of Record for Appellant
J. Harold Shepherd

Atlanta, GA • FRANKLIN COPY SERVICE • (404) 525-0406

QUESTIONS PRESENTED

1. Whether 1968 *Ga. Laws* 1249, 1308 (*Ga. Code Ann.* §26-2308(a)) which provides a penal sanction for any person who enters into a contract, combination or conspiracy in restraint of free and open competiton in a transaction with the State of Georgia is invalid under the Fourteenth Amendment to the United States Constitution since the term "Conspiracy in Restraint of Free and Open Competition" is not defined by the statute, has no meaning at common law, is not defined by common understanding or practice and infringes upon speech which is protected by the Constitution.

2. Whether the action of the trial court in ruling on motions filed of record without hearing evidence or oral argument of counsel denied the appellants due process of law under the Fourteenth Amendment to the United States Constitution.

3. Whether the action of the State of Georgia in denying appellants' requests for discovery asking for access to exculpatory material and the action of the trial court in summarily denying the appellants' discovery motions without hearing or considering evidence is violative of due process under the Fourteenth Amendment to the United States Constitution.

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SHEPHERD CONSTRUCTION CO., INC.,
DAN P. SHEPHERD AND J. HAROLD SHEPHERD,
Appellants,

v.

STATE OF GEORGIA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The judgement of the Supreme Court of Georgia was entered on July 7, 1981 and revised on July 23, 1981. Timely motions for reconsideration were filed. The motion for reconsideration in case number 37387 was denied on July 23, 1981, and the motion for reconsideration in case numbers 37421 and 37422 was denied on July 30, 1981. The text of the two opinions of the Supreme Court of Georgia, the orders on the motions for reconsideration issued by that Court together with the relevant Orders of the Superior Court of Fulton County, Georgia, are in the Appendix. The revised opinion of the Supreme Court of Georgia is reported at 248 Ga. 1, 281 S.E. 2d 151 (1981).

JURISDICTION

At the earliest possible stage of the proceedings before the Superior Court of Fulton County, Georgia, the appellants raised the claim that *Ga. Code Ann.* §26-2308(a) is unconstitutionally vague and overbroad and therefore violative of the Fourteenth Amendment to the United States Constitution, and that the State's action in denying appellant's requests for access to exculpatory materials in the State's possession violates the appellant's due process rights under the Fourteenth Amendment to the United States Constitution. The Supreme Court of Georgia, in a four-two divided opinion, held that the statute did not infringe upon protected speech and was neither unconstitutionally overbroad nor vague. The Supreme Court of Georgia further found the discovery request to be without merit and summarily affirmed the action of the trial court in denying appellants' discovery motions without hearing evidence or oral argument of counsel, in essence holding that the action of the State in denying appellants' request for access to exculpatory materials was not violative of due process. It thus considered and expressly rejected the federal constitutional claims. These important federal questions were timely raised by appellants throughout the proceedings before the trial court and in the Supreme Court of Georgia.

The opinion of the Supreme Court of Georgia, upholding the validity of *Ga. Code Ann.* §26-2308(a), was entered on July 7, 1981. A motion for reconsideration was filed in case number 37387 and denied on July 23, 1981. A motion for rehearing was entertained and denied on July 30, 1981 in case numbers 37421 and 37422.

A notice of appeal to this Court was duly filed in the Supreme Court of Georgia on September 21, 1981.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2) (1976). The following decisions of this Court confirm that there is jurisdiction over this appeal as a matter of right under that statute: *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979); *Cohen v. California*, 403 U.S. 15 (1971); *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965); *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. First Amendment: United States Constitution:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Applicable to the State of Georgia via the Fourteenth Amendment to the United States Constitution. *Gitlow v. New York*, 268 U.S. 652 (1952).

2. Fourteenth Amendment: Section 1: United States Constitution

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws.

3. 1968 *Ga. Laws* 1249, 1308 *(Ga. Code Ann.* §26-2308(a)): Conspiracy in restraint of free and open competition.

(a) Transactions with the State:

A person who enters into a contract, combination, or conspiracy in restraint of trade or in restraint of free and open competition in any transaction with the State or any agency thereof, whether said transaction be for goods, materials, or services, shall, upon conviction, be punished by imprisonment for not less than one nor more than five years. The crime of conspiracy in restraint of free and open competition in transactions with the State shall be complete when the contract, combination, or conspiracy is effected, and an overt act in furtherance thereof has been committed.

STATEMENT OF THE CASE

Appellants Shepherd Construction Co., Inc., Dan P. Shepherd, President of Shepherd Construction Co., Inc., and J. Harold Shepherd, Vice-President of Shepherd Construction Co., Inc., are the appellants in this action. Shepherd Construction Co., Inc. is a contractor primarily engaged in the business of constructing highways. The Company works mostly on projects for the Georgia Department of Transportation. The Company is a qualified bidder on DOT projects and obtains its highway construction contracts through a bidding system established and maintained by the DOT.

In connection with an intensive and well publicized investigation of the highway construction industry in Georgia, Arthur K. Bolton, at that time the Attorney General of the State of Georgia, issued an Administrative Order on November 20, 1980 designating certain individuals as his representatives for the presentation of the case State v. Shepherd Construction Co., Inc., Dan P. Shepherd and J. Harold Shepherd before a grand jury and any subsequent criminal proceedings. The next day these Special Prosecutors obtained an indictment in seven

counts from a Fulton County, Georgia, grand jury charging the appellants with conspiracies to restrain free and open competition in transactions with the State under *Ga. Code Ann.* §26-2308(a). Shepherd Construction Co., Inc. was indicted under all seven counts, Dan P. Shepherd was indicted under four counts and J. Harold Shepherd was indicted under five counts.

Count One alleges that on May 14, 1975, Shepherd Construction Co., Inc. and Dan P. Shepherd conspired with Inter State Paving Company and its officials to restrain and prohibit Inter State from submitting competitive bids on highway projects in Georgia from July 1, 1975, to June 1, 1976, and that on August 21, 1975 Dan P. Shepherd solicited an artificially high bid from Inter State. No other acts are alleged to have occurred during the one year period of the claimed conspiracy. The Georgia Supreme Court determined that prosecution of Count One is barred by the applicable statute of limitations and this Count is no longer at issue in this case. (Appendix, A4-A5).

Count Two accuses Shepherd Construction Co., Inc. and J. Harold Shepherd of conspiring with Inter State and its officials and "others" (who are unnamed) to predetermine the low bidder on a State highway project. The State contends that Shepherd Construction Co., Inc. agreed to submit a high bid on the project in exchange for a cash payment from Inter State in an amount equal to 50 cents per ton of asphalt mix to be used on the project. It is alleged that the high bid was submitted on September 28, 1977, but there is no allegation that the cash payment was made.

Count Three alleges that on October 25, 1977, Shepherd Construction Co., Inc. conspired with Hoover, Inc., Road Builders, Inc. and "others" (not named) to predetermine the low bidder on a State highway project in Hall and Jackson Counties.

Counts Four and Five allege that the appellants conspired on November 17, 1977, with Inter State and "another" (not named) to predetermine the low bidders on two segments of construction of Interstate 20 in DeKalb and Rockdale Counties. Count Four says that Shepherd Construction Co., Inc. in a

joint venture got one segment of the project and Count Five says that Inter State got the other segment.

Count Six alleges that Shepherd Construction Co., Inc. and J. Harold Shepherd conspired on October 25, 1977 with Road Builders, Inc. of Tennessee, Hoover, Inc., Inter State and "others" (unnamed) to predetermine the low bidder on a State highway project in Gwinnett and Barrow County and that Shepherd Construction Co., Inc. submitted a bid which enabled "another company" to be low bidder on the project.

Count Seven alleges that the appellants conspired with Inter State and "another" (unnamed) to predetermine the low bidder on a State highway project and to enable Inter State to be the low bidder.

Appellants were arraigned on January 16, 1981, and entered pleas of not guilty to all charges. The trail court scheduled hearings on all motions, pleas and demurrers for the week of February 2, 1981, and set trial for April 6, 1981. Since a number of appellants' motions were evidentiary in nature, witnesses were under subpoena for the hearing on February 2, and appellants were prepared to offer evidence on a number of contested issues.

The appellants filed two motions in the Superior Court of Fulton County, Georgia which are the subject matter of this appeal. The first is a motion to dismiss the indictment because the underlying statute, *Ga. Code Ann.* §26-2308(a) is unconstitutionally vague and overbroad. The second is a motion for discovery and to compel disclosure of exculpatory materials and a motion for discovery regarding the pre-indictment phase of this case.

The Superior Court of Fulton County considered argument as to the constitutionally of the statute on vagueness grounds. After hearing the argument, the trial court ruled the statute unconstitutional finding that ". . . the statute's term 'conspiracy in restraint of free and open competition' is overly broad and unconstitutionally vague in that said term has no meaning at common law, is not defined by common understanding and practice and does not apprise the defendants or the public of the

proscribed conduct within the intendment of the statute " (Appendix, A21). This ruling terminated the proceedings.

Despite the fact the proceedings had been terminated, the trial court issued a written order the next day finding that the appellants had waived oral argument on all other issues and denying most of the appellant's motions, pleas and demurrers, including appellant' motion for discovery and to compel disclosure of exculpatory materials and motion for discovery regarding the pre-indictment phase of the case. (Appendix, A22-A26). This order was entered at 8:45 A.M., five minutes before the written order declaring the statute unconstitutional.

The State appealed the decision holding the statute unconstitutional to the Supreme Court of Georgia. Appellants brought a cross-appeal raising numerous issues. The relevant issues raised in the cross-appeal in the Supreme Court of Georgia, for purposes of this appeal, are that the trial court erred in denying appellant's motions to compel discovery and that the trail court erred in ruling that the appellants waived oral argument on any motions filed of record on February 2, 1981. In an opinion issued on July 7, 1981, a divided Supreme Court of Georgia held that *Ga. Code Ann.* §26-2308(a) is not unconstitutionally vague or overbroad. (Appendix, A13-A15). The Court came to this conclusion via a reasoning process in which it equated a "conspiracy in restraint of free and open competition" with "a conspiracy in restraint of trade" and inserted the word "unreasonable" (where is nowhere found in the statute) as a qualifying term for both the phrase "restraint of trade" and "restraint of free and open competition" by judicial fiat. (Appendix, A13-A15). The Supreme Court of Georgia also summarily held appellant's enumeration of errors regarding discovery meritless, with no discussion whatsoever of these issues. (Appendix, A17). After this decision was issued, the Supreme Court of Georgia issued a revised opinion on July 23, 1981, but the holdings and discussion of the issues now before this Court remained the same. (Appendix, A2-A4and A7). The remainder of this revised opinion is not relevant to the instant appeal. Appellants filed a motion for reconsideration of this revised opi-

nion which was denied on July 30, 1981. (Appendix, A10-A11).

Because the highest court of the State of Georgia upheld the validity of the Georgia statute despite apellant's claim that the law is repugnant to the United States Constitution, appellants are entitled to an appeal as of right to this Court under 28 U.S.C. §1257(2)(1976). Where a state court construes a state law in a manner which conflicts with the United States Constitution, this Court has consistently held there is an appeal of right available under 28 U.S.C. 1257(2)(1976) and its predecessor. *See, e.g. La Crosse Tel. Corp. v. Wisconsin Board*,336 U.S. 18 (1949); *Railway Express Agency v. Virginia*, 282 U.S. 440 (1931); *King Manufacturing Co. v. City Council of Augusta*, 277 U.S. 100 (1928). Because the Supreme Court of Georgia erred in its decision holding that the Georgia statute prohibiting conspiracies in restraint of free and open competition is not violative of the United States Constitution, appellants have filed a timely notice of appeal to this Court following the denial of appellant's motion for reconsideration by the Supreme Court of Georgia. (Appendix, A27-A29).

SUBSTANTIALITY OF THE FEDERAL QUESTIONS

A. THE ISSUES IN THIS CASE PRESENT A "FINAL JUDGEMENT" AND SHOULD BE REVIEWED BY THIS COURT AT THIS TIME.

A preliminary issue present in this apeal is whether or not this case presents a "final judgement" pursuant to 28 U.S.C. §1257(2) and is therefore appropriately presented to this Court at this juncture in the litigation. There is no self-enforcing formula which defines when a judgement is "final." This Court has often given the finality requirement a "practical rather than a technical construction." *Cohen v. Beneficial Industrial Loan Corp.*,337 U.S. 541, 546 (1949). *See also Abney v. United States*, 431 U.S. 651, 685 (1977); *Eisen v. Carlisle and Jacquelin*, 417

U.S. 156, 171 (1974); *Chapman v. California*, 1020 , 405 U.S. 1021 (1971). This court has also been inclined to follow a "pragmatic approach" to the question of finality, *Bradley v. Richmond School Board*, 416 U.S. 696, 722-23, n. 28 (1974), and to define a final decision as not necessarily meaning "the last order possible to be made in a case." *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964). The concept of finality has acquired an expanding "penumbral area," *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945); *North Dakota Pharmacy Board v. Snyder's Stores*,414 U.S. 156, 160 (1973), which generally encompasses situations, such as this one, in which the highest Court of a state has finally determined the federal issue present in a particular case, but in which there are further proceedings in the state courts yet to come. Supreme Court rulings such as *Local No. 438 Construction Laborers v. Curry*, 371 U.S. 542 (1963), and *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963), look beyond the mere fact that further proceedings are contemplated, and assess finality of the ruling on the federal question in terms of the likely impact of the subsequent proceedings on that ruling or on the federal policies at stake.

The most significant case in this area is *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). There the Court was confronted with a state court opinion that had rejected challenges under the Fourteenth Amendment to a Georgia statute authorizing suits against the press for publishing the name of a rape victim. After validating the statute and finding that the trial court had erroneously entered summary judgement for the plaintiff victim, the Supreme Court of Georgia remanded the case for a full trial on the merits of the cause of action. In accepting jurisdiction to review that judgement, this Court stated:

> The Georgia Supreme Court's judgement is plainly final on the federal issue and is not subject to further review in the State courts . . . (E)ven if appellants (the press) prevailed at trial and made unnecessary further consideration of the constitutional questions, there would remain in effect the unreviewed decision of the State Supreme Court

> that a civil action for publishing the name of a rape victim disclosed in a public judicial proceedng may go forward despite the First and Fourteenth Amendments. Delaying final press decision in the First Amendment claim until after trial . . . will leave the press in Georgia operating in the shadow of the civil and criminal sanctions of a rule of law and a statute, the constitutionality of which is in serious doubt. 420 U.S. at 485-86.

The Court concluded that according finality to this state court judgement would be "consistent with the pragmatic approach we have followed in the past determining finality." 420 U.S. at 486. The Court further stated:

> That the petitioner who protests against the state court's decision on the federal questions might prevail on the merits on nonfederal grounds in the course of further proceedings anticipated in the state court and hence obviate later review of the federal issue here is not preclusive of our jurisdiction. *Curry, Langdeau, North Dakota State Board of Pharmacy, California v. Stewart*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) (decided with Miranda v. Arizona), and *Miami Herald Publishing Co. v. Tormillo*, 418 U.S. 241, 94 S. Ct. 2831, 41 L. Ed. 2d 730 (1974), make this clear. In those cases, the federal issue having been decided, arguably wrongly, and being terminative of the litigation if decided the other way, the finality rule was satisified. 420 U.S. 469, 487 n. 13 (1975).

Cox is on point with the instant case. Here, the decision of the Supreme Court of Georgia is clearly final on the federal issues. Appellants may not present these issues for further consideration by the trial court, since the highest court of the State of Georgia has addressed them. Even if appellants prevail on the merits at the trial of this action, there will remain in effect the final judgement of the Supreme Court of the State of Georgia that a Georgia statute providing that any person who enters into a conspiracy in restraint of free and open competition in a transaction with the State is valid under the Fourteenth Amendment to the United States Constitution. Delaying final decision on the claim involving the constitutionally of the Georgia

statute until after the trial of this action leaves every businessman in Georgia who does business with the State in peril of being indicted under an unconstitutional statute, and if the appellants prevail on the merits in trial court, it may be years before this issue can be presented to this Court again. This point is illustrated by the fact that Georgia statute was passed in 1968 but the first indictment under the statute was not until 1981, thirteen years later.

Cases such as *Bateman v. Arizona*, 429 U.S. 1302 (1976), which state that a "final judgement" generally means the imposition of a sentence are inapplicable. In *Bateman*, the defendant was convicted under the Arizona criminal statute. The trial court, upon post-trial motion of defendant's counsel, held the Arizona statute at issue unconstitutional. When the issue was addressed by the Supreme Court of Arizona, the Court validated the statute and remanded the case to the trial court to enter a judgment of conviction and to sentence the defendant. The defendant filed an "Application for Bail Pending Certiorari or in the Alternative Application for Stay of Mandate of the Supreme Court of the State of Arizona" before the trial court after its sentencing. The trial judge denied the application and this denial was affirmed by the Arizona Supreme Court. The defendant brought this same application before the Supreme Court of the United States as part of a petition for certiorari. Thus, the actual issue before the Supreme Court of the United States in *Bateman* was an application to Mr. Justice Rehnquist, as Circuit Justice, for bail pending certiorari or, in the alternative, for stay of the mandate of the Supreme Court of Arizona. This Court denied that request because it did not wish to interfere with the state judicial process, stating: "Due respect for the principles of comity necessitates a demonstration of compelling necessity before a single Justice of this Court will stay the considered mandate of the highest state tribunal." 429 U.S. at 1302. As a supplemental reason, this Court noted, in addition, that final judgement generally means imposition of a sentence, 429 U.S. at 1306, and that there "was a question" regarding the finality of the judgement sought to be reviewed which weighed against the applicant. This Court did not hold

that the judgement was not final, but merely that a question existed regarding the finality.

It is clear that in ***Bateman*** the Court denied the defendant's application because it did not wish to interfere with the state judicial process. Here, the Supreme Court of Georgia has stayed the remittitur in this case in order that an appeal or an application for certiorari could be filed with this Court. (Appendix, A20). The Supreme Court of Georgia directed that this stay operate until the final disposition of the case in this Court. Therefore, the noting of jurisdiction by this Court would show all due respect for the important principle of comity between the federal and state courts. The Supreme Court of Georgia, unlike the Supreme Court of Arizona in ***Bateman***, has impliedly held that the federal issues present in this case are ripe for review at this time through its stay of all proceedings until final disposition of this appeal in this Court. Further, as noted previously, the court in ***Bateman*** did not hold the judgement presented was not a "final judgment" within the meaning of 28 U.S.C. §1257; it merely noted that any doubt that might exist on this point weighed against the applicant. It is respectfully submitted by the appellants that the instant case is much more like *Cox Broadcasting Corp. v. Cohn*, discussed *supra*, than ***Bateman***. ***Bateman*** is simply not persuasive authority on the issue of "final judgement". When the finality of the ruling is assessed in terms of the federal policies at stake, the fact that the federal issue in this case has finally been determined and that it may be years before this important issue can again come before this Court means that the "final judgment" on the issues present in this appeal was the Supreme Court of Georgia's July 23, 1981 opinion.

Furthermore, if the appellants in this action are found not guilty in the trial court, the important federal issues in this case will not be considered. A prime example of this finality yardstick is displayed in *North Dakota Pharmacy Board v. Snyder's Stores*, 414 U.S. 156 (1973). There the Court found finality because the federal issue that had been resolved in the state court's original judgment could not survive the remand for further state administrative proceeding. In that case, the State Pharmacy Board had refused to issue an operating permit in reliance on a state statute, which the North Dakota Supreme Court then held invalid under the federal Constitution. But the

remand of the matter for further proceedings "sans the (federal) constitutional issue" made it clear that any subsequent grant or denial or the permit, or an appeal therefrom, would be based solely on state law grounds, and that the federal issue could not be renewed. In such circumstances, the state court's resolution of the federal constitution issue was deemed ripe for review before the remand was effectuated. 414 U.S. at 162-63.

California v. Stewart, 384 U.S. 436 (1966) is also relevant. There, a state court judgment, voiding a conviction on federal constitutional grounds and ordering a retrial was held final since no appeal would be available to the petitioning state if the defendant was acquitted on the retrial, making it impossible to renew the federal constitutional question.

Here, as in *Stewart*, if the appellants are acquitted at the trial of this action, the federal constitutional question will not be reviewed. The appellants, since their work includes constant contracts with the State, even though acquited, must face the prospect of again being indicted under an unconstitutionally vague and overbroad statute which was validated by a divided State Supreme Court in an opinion containing a persuasive and incisive dissent. (Appendix, A8). The remaining litigation will not give rise to a federal question. The federal questions presented here ***have*** been finally adjudicated by the highest state court. As this Court noted in *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945), this Court departs from an absolute "finality" requirement for federal appellate jurisdiction when a ruling may cause serious public consequences. 326 U.S. at 123. This requirement is certainly met here. This important issue should be reviewed now.

B. 1968 *GA. LAWS* 1249, 1308 (*GA. CODE ANN.* §26-2308(a)) IS UNCONSTITUTIONALLY VAGUE BECAUSE THE TERM "CONSPIRACY IN RESTRAINT OF FREE AND OPEN COMPETITION" IS NOT DEFINED BY THE STATUTE, HAS NO MEANING AT COMMON LAW AND IS NOT DEFINED BY COMMON UNDERSTANDING OR PRACTICE.

Appellants respectfully submits that the Supreme Court of Georgia seriously misanalyzed the relevant precedents in validating *Ga. Code Ann.* §26-230(a). It did not properly hold

Ga. Code Ann. §26-2308(a) unconstitutionally vague and overbroad as dictated by the decisions of this Court. The Supreme Court of Georgia, in a cursory eleven paragraph discussion of the entire issue, held the Georgia statute constitutional through basically the following reasoning: The prohibition against "a conspiracy in restraint of free and open competition" is to be interpreted to mean and is the same as "a conspiracy in restraint of trade." The Court by judicial construction may insert the work "unreasonable" as a term qualifying both the phrase "restraint of trade" and the phrase "restraint of free and open competition." (Appendix, A2).

After erroneously assuming the existence of a common law definition for its newly created phrase "unreasonable restraint of free and open competition" by referring to cases decided under the Sherman Act, which has an extensive common law background and completely different language from the Georgia statute, the Court concluded that the appellants had more that fair notice that their conduct was prohibited by *Ga. Code Ann.* §26-2308(a). (Appendix, A2-A4). Thus, the Supreme Court of Georgia did not analyze the Georgia statute in light of the holdings of this Court in cases such as *United States v. Cohen Grocery Co.*, 255 U.S. 81 (1921); *Connally v. General Construction Co.*, 269 U.S. 385 (1926); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939)and *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927), which hold that if a term is not sufficiently definite to provide a standard of conduct in a criminal statute it is unconstitutionally vague. The holding of the Supreme Court of Georgia is contrary to the controlling decisions of this Court. Most significiant, the Supreme Court of Georgia did not consider whatsoever the language of the statute to determine if the terms "conspiracy in restraint of free and open competition" or "transactions with the State" certain a core of meaning or understanding.

If a term in a statute has no meaning, derived either from a definition in the statute, common law history or commonly understood meaning, there is no necessity for an examination of the precise conduct and a facial attack should be allowed. If the term means nothing, it is unconstitutionally vague and therefore void.

This Court has concluded on a number of occasions that ef-

forts by the highest court of a state to validate a statute which is unconstitutionally vague and therefore repugnant to the United States Constitution should not be permitted. *See, e.g., Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927) (Colorado antitrust law struck down as vague); *Connally v. General Construction Co.*, 269 U.S. 385 (1926) (Oklahoma law regulating wages of state employees struck down as vague). The classic example is *Lanzetta v. New Jersey*, 306 U.S. 1 (1939). In *Lanzetta*, this Court struck down on vagueness ground a New Jersey statute making it a penal offense to be a "gangster." The Court struck down the statute as facially invalid.

In *Parker v. Levy*, 417 U.S. 733 (1974), this Court explained why in *Lanzetta* type cases a statute should be determined invalid on its face without an inquiry into the precise conduct alleged:

> This Court has on more than one occassion invalidated statutes under the due process clause of the Fifth or Fourteenth Amendment because they contained no standard whatever by which criminality could be ascertained, and the doctrine of these cases has subsequently acquired the shorthand description of "void for vagueness." (citing *inter alia Lanzetta*) . . . In these cases, the criminal provision is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." 417 U.S. at 755.

The vagueness problem here is fundamental. The term is the Georgia statute — "restraint of free and open competition in transactions with the State" — communicates nothing. There is no core of meaning or understanding associated with the term. It is vague not just as to marginal conduct, but as to all conduct. Because the term is so devoid of content it conveys notice to no one, including the appellants. As this Court stated in *Connally v. General Construction Co.*, 269 U.S. 385 (1926), where it invalidated an Okalahoma statute which provided that "not less than the current rate of per diem wages in the locality" would be paid to employees of the State: "(t) he vice of the statute here lies in the impossiblility of ascertaining, by any reasonable test,

that the Legislative meant one thing rather than another . . . " 269 U.S. at 394. The exact same vice exists in the Georgia statute here.

Similar objections can also be made to the term "transaction with the State". What constitutes a transaction with the State? Are only direct transactions with the State included, as where bids are directly submitted by a contractor? Are agreements between suppliers who sell to manufacturers who in turn deal with the State included? Are subcontractors included? The statute gives no clue as to what is meant or included. Apparently, any transaction that affects a transaction with the State in any way, no matter how remote, insignificant, or far removed, is included within the prohibitions of the statute. The problem with the language of the statute is not that a person would have diffuculty if deciding whether his contemplated conduct would fall on one side or the other of an existing and intelligible standard of guilt; the problem is that no intelligible standard of guilt is given. The problem with the analysis employed by the Supreme Court of Georgia is that it failed to consider the term "restraint of free and open competition" at all. Instead, it interpreted the term "unreasonable restraint of competition" which is what it deemed synonymous with both a conspiracy "in restraint of free and open competition" and "in restraint of trade." Since the Georgia statute prohibits both conspiracies in "restraint of trade" or "in restraint of free and open competition," this interpretation equates the two and makes the statute redundant. This tortured analysis means the Supreme Court of Georgia never considered the appropriate statutory language in light of the relevant controlling authorities of this Court. If it had, it would have held the language unconstitutionally vague, since it gives no notice of what conduct is prohibited.

Further, the decisions of this Court which the Supreme Court of Georgia relied upon in holding that "a conspiracy in restraint of trade or in restraint of free and open competition" means a prohibition against a conspiracy in unreasonable restraint of competition deal with interpretations of the Sherman Act. These cases are *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1977); *Northern Pacific Railway*

Co. v. United States, 356 U.S. 1 (1958); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933); and *Standard Oil Company of New Jersey v. United States*, 221 U.S. 1 (1910). Cases construing the Sherman Act are irrelevant. First, the language of the statute is different. The Sherman Act prohibits conspiracies in "restraint of trade." Second, there is a long line of federal cases construing the Sherman Act in the civil context which arose before violations were deemed felonies which gave some definition to the federal crime. Other federal antitrust cases cited in the Supreme Court of Georgia's opinion, i.e., *United States v. United States Gypsum Co.*, 438 U.S. 422, 483-40 (1978), and *United States v. Brighton Building & Maintenance Co.*, 598 F. 2d 101, 105 (7th Cir. 1979), *cert. denied* 444 U.S. 840 (1980) make it clear that the Sherman Act itself has been held to possess the requisite constitutional certainty only because of a judicial gloss limiting the application of the criminal sanction to limited categories of so-called *per se* offenses. Civil and criminal cases decided under the Sherman Act have articulated and developed a distinction between *per se* and non-*per se* offenses, and civil precedents have developed and defined the parameters of the application of criminal sanctions. With the Georgia statute, there is no civil counterpart, no legislative or judicial history, and no definitions in the statute. It is illogical for the Supreme Court of Georgia to construe the statute in question as a "little Sherman Act" limited to transactions with the State and adopt federal decisions dealing with a dissimilar law with a vastly dissimilar background and interpretation.

The statute as applied in this case illustrates not only the vagueness of its terms, but also the impossibility of relying upon the common law or the Sherman Act as the guide for future actions. Suppose a businessman in Georgia wanted to determine whether exchanging price information with a competitor would violate *Ga. Code Ann.* §26-2308(a). Contrary to what the Court has held, a businessman who relied on the common law or the cases construing the Sherman Act would be misled in thinking that he had committed no crime in the state of Georgia.

The reasons for this are many. First, the Sherman Act re-

quires specific intent. *United States v. United States Gypsum Co.*, 438 U.S. 432 (1978). Second, even though price fixing is illegal *per se*, the mere fixing of a price is not violative of the Sherman Act. *Broadcasting Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979). Third, it has been held that the Sherman Act requires proof of some adverse effect or injury. *Windham v. American Brands, Inc.*, 565 F. 2d 59 (4th Cir. 1977), *cert. denied* 435 U.S. 968 (1978). Relying on the Sherman Act, which codified the common law, a businessman would conclude that as long as he did not intend to restrain competition and that so long as his actions did not in fact restrain competition, the mere exchange of the price information with a competitor would not violate the Georgia statute. The Georgia statute, however, is not similar to the Sherman Act or the common law. The Georgia statute seemingly prohibits the exchange of all price information, complimentary bids, joint ventures and sub-contracts regardless of intent or effect. This language is vague, gives notice to no one of what conduct is prescribed, and violates the Fourteenth Amendment to the United States Constitution.

C. *GA. CODE ANN.* §26-2308(a) IS UNCONSTITUTIONALLY OVERBROAD BECAUSE IT IMPERMISSIBLY RESTRICTS PROTECTED COMMERCIAL SPEECH.

In discussing constitutional overbreadth, the Supreme Court of Georgia correctly stated that a statue is overbroad if it "sweeps within its ambit activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press," (Appendix, A2) but characterized the speech affected by the Georgia statute as speech which is "used in such circumstances and [is] of such a nature as to create a clear and present danger that it will bring about the substantive evils that [the state] has a right to prevent. (citing *Schenck v. United States*, 249 U.S. 49 (1919)). (Appendix, A2). As will be shown in the following discussion, *Schenck* and the "clear and present danger" analysis only applies in the context of subversive activity. The speech, prohibited by the Georgia statute, is com-

mercial speech, which is clearly entitled to First Amendment protection.

Bigelow v. Virginia, 421 U.S. 809 (1975) and its progeny established that commercial speech is entitled to First Amendment protection and that any statute "which impairs 'the flow of truthful and legitimate commercial information' is constitutionally infirm." All legitimate and truthful commercial information is protected from state infringement in the same manner and extent as any other privileged speech. *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977). *Ga. Code Ann.* §26-2308(a), on its face and as applied in this case, does impair the flow of protected commercial information.

The indictment alleges that appellants and others exchanged price information the day before bids on various road projects were to be submitted to the State. This, according to the State, constitutes price fixing and is illegal *per se*. Properly alleged price fixing should be condemned, but only where intent to restrain competition or some anti-competitive effect is proven. Otherwise, the statute punishes the appellants solely on the content of their speech. This is clearly and patently violative of the First Amendment. *Ga. Code Ann.* §26-2308(a) contains no specific intent requirement. Furthermore, the argument that the statute should be read to include an actual impact on trade as an element of the crime was rejected by the trial court and by the Supreme Court of Georgia. Therefore, since proof of actual impact on trade is not a prerequisite to conviction under the statute, appellants stand to be convicted merely on proof of the exchange of price information. It is totally irrelevant whether this conduct was done in good faith or whether it harmed the State. There is no indication that the price information exchanged was anything but truthful and legitimate, so the statute cannot be justified on that basis. Neither can the statute be justified as a reasonable time, place or manner restriction. *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104 (1972). The statute does not regulate speech which is merely incidental to conduct, or which regulates criminal transactions. If the exchanges of prices were done without intent to restrain competi-

tion and if competition was not actually restrained, it necessarily follows that the State may not prohibit the speech or make it illegal. *Ga. Code Ann.* §26-2308(a) is exactly the kind of statute restricting the flow of "truthful and legitimate commercial information" found to be constitutionally infirm by *Linmark, supra*, and *Bieglow, supra*. Unless *Ga. Code Ann.* §26-2308(a) is invalidated, appellants stand to be punished solely for the content of their speech.

The Supreme Court of Georgia properly determined that *Ga. Code Ann.* §26-2308(a) bans certain speech. The remainder of its analysis, however, is patently faulty. As explained above, all legitimate and truthful comercial information is protected from State infringement in the same manner and extent as any other privileged speech. The exchange of price information is legitimate and essential commercial speech. *Maple Flooring Manufacturers Association, et al. v. United States*, 268 U.S. 563 (1925). *Ga. Code Ann.* §26-2308(a) impairs the free flow of price information, joint venture arrangements, and subcontracts, as well as any other commercial speech or dealing between competitors which might allegedly restrain "free and open competition." The statute allows punishment solely on the content of speech, without any evidence of actual impact on trade.

The Supreme Court of Georgia, relying on *Schenck v. United States*, 249 U.S. 49 (1919), adopted a "clear and present danger" analysis and held that since the Georgia statute bans speech which creates a clear and present danger that individuals will conspire to create an unreasonable restraint against competition, it is not unconstitutionally overbroad as infringing upon speech protected by the First Amendment. (Appendix, A 3). Appellants submit that the clear and present danger analysis does not apply to this case. Clear and present danger cases arise in the context of legislation prohibiting subsersive activities. *See, e.g., Dennis v. United States* 249 U.S. 49 (1918); *Gitlow v. New York*, 268 U.S. 652 (1925); *Debs v. United States*, 249 U.S. 204 (1919); *Schenck v. United States*, 249 U.S. 49 (1918). This clear and present danger analysis has no application outside of this particular context. *See, e.g., Wood v.*

Georgia, 370 U.S. 375 (1962); *Craig v. Harney*, 331 U.S. 367 (1947); *Penekamp v. Florida*, 328 U.S. 331 (1946); *Bridges v. California*, 314 U.S. 252 (1941).

The Supreme Court of Georgia compounded its error by misconstruing the clear and present danger standard. In the sixty-three years since *Schenck, supra*, was decided, this Court has had many opportunitites to hear clear and present danger cases. According to the current formulations of the standard, a state cannot punish the mere advocacy of lawlessness. Before a state can prohibit this kind of speech it must be shown that it was spoken with the *intent* to cause imminent lawlessness and that it was likely to cause such lawlessness. *Hess v. Indiana*, 414 U.S. 105 (1973). Since the Georgia statute permits a conviction regardless of intent, even if the clear and present danger standard was properly applied to this case, it could not be used to validate the statute. The Georgia statute still impermissibly infringes upon constitutionally protected commercial speech.

D. THE SUPREME COURT OF GEORGIA ERRED IN RULING THAT THE APPELLANTS WAIVED ORAL ARGUMENT ON ANY MOTIONS FILED OF RECORD AND IN DENYING APPELLANTS MOTION FOR DISCOVERY.

The issue regarding the constitutionality of *Ga. Code Ann.* §26-2308(a) lies squarely within this Court's jurisdiction under 28 U.S.C. §1257(2)(1976) since the Georgia statute is repugnant to the United States Constitution and the decision of the Supreme Court of Georgia was in favor of its validity. Appellants are entitled to present in this appeal any other denial of federal right whether or not capable in itself of being brought on appeal, and the non-appealable issues are to be considered along with the merits of the appealable issues. *Flournoy v. Wiener*, 321 U.S. 253, 263 (1944); *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 547 (1922). This court expressly ruled to this effect in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), where it stated: "In finding that we have appellate jurisdiction, we also take jurisdiction over any aspects of the case which would otherwise fall solely within our certiorari jurisdiction." 420 U.S.

at 487, n. 14. Thus, the issues regarding discovery are properly presented for consideration in this jurisdictional statement.

The Superior Court of Fulton County, Georgia ruled that the appellants waived oral argument on all motions filed of record on February 2, 1981, and then proceeded to rule on all pending motions, pleas and demurrers without permitting evidence or argument. (Appendix, A22-A26). There is absolutely no basis for this ruling. The trial court had set aside the entire week of February 2, 1981, for consideration of appellants' demurrers, pleas and motions. Many of these involved evidentiary matters and appellants were prepared to offer evidence and had witnesses under subpoena.

The proceedings were truncated by the trial court's ruling on the constitutional issue. No consideration was given to most of the appellants' other motions, pleas and demurrers and appellants had no opportunity to present evidence on the issues. After ruling from the bench that the statute was unconstitutional, the trial court terminated the proceedings. Then, without notice to any party and without allowing an opportunity for hearing or evidence, the trial court denied most of appellants' pending motions, pleas and demurrers and certified this ruling for interlocutory appeal. (Appendix, A22-A26).

Although the trial judge's desire to submit all issues in the case to the Supreme Court of Georgia for a single review is understandable, this should not be done by depriving the appellants of due process of law. The appellants should have been given an opportunity to present facts, evidence and argument in support of their motions, pleas and emurrers. The Supreme Court of Georgia should have reversed the trial court's finding of a waiver and vacated all portions of the order entered at 8:45 A.M. on February 3, 1981 which were not argued or considered prior to the trial court's pronouncement from the bench that the statute was unconstitutional. Instead the Supreme Court of Georgia held this enumeration of error without merit, with no discussion whatsoever of the issue. (Appendix A7).

This appeal does not concern a routine criminal proceeding. Indeed, as far as the appellants have been able to determine, the

present indictment is the first prosecution under the provision of *Ga. Code Ann.* §26-2308(a). It is therefore especially essential that the appellants be provided with fair discovery.

Appellants made prompt and seasonable requests for discovery. In addition, the appellants filed the discovery demands currently available by Georgia statute. At the time of the motion hearing on February 2, 1981, as a result of these discovery requests, appellants had merely received a list of witnesses (without addresses or phone numbers) and a statement that the prosecution would furnish any ***Brady*** material "when and if discovered." In fact, it was obvious from the responses filed by the prosecution to appellants' discovery motions that the State was determined to oppose any attempt at discovery and failed to fulfill its duties under ***Brady v. Maryland***, 373 U.S. 83 (1963) and its progeny. Appellants' discovery motions were summarily overruled by trial court without hearing or considering evidence.

Appellants should have been afforded a full hearing on their entitlement to pretrial discovery to permit them to obtain a fair trial and to permit effective preparation for trial. Anything less deprived appellants of due process under the Fourteenth Amendment to the United States Constitution. In addition, it deprived the appellants of effective assistance of counsel under the Sixth Amendment to the United States Constitution which is applicable to the State of Georgia via the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Cf. United States v. Woods*, 487 F.2d 1218 (5th Cir. 1973) (recognizing that pretrial preparation by counsel is essential).

Provisions requiring the State to disclose evidence and information to a criminal defendant are of recent vintage. Common law recognized no such requirement. However, the deficiency was mitigated somewhat by requiring detailed indictments. Krantz, *Pretrial Discovery in Criminal Cases: A Necessity for Fair and Impartial Justice*, 42 Neb. L. Rev. 127 (1962); *Developments in the Law-Discovery*, 74 Harv. L. Rev. 940, 1051 (1961). In support of a reluctance to afford discovery, it has been said that affording a criminal defendant discovery would give him an

unfair advantage or jeopardize the safety of witnesses. Neither of the foregoing reasons has any application here. The identity of the State witnesses are already known and there has been no suggestion of any danger to them. Furthermore, it is the State, not appellants, which has the advantage in investigating the case. The grand jury has become an important investigative tool whereby the prosecution can compel witnesses to testify and keep their testimony secret. In this case the prosecution has also been able to arrange pleas bargains and interviews and take statements of the witnesses listed on the indictment and these witnesses have refused to talk with appellants' counsel.

The rule set out in *Brady v. Maryland*, 373 U.S. 83 (1963) is that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment irrespective of the good faith or bad faith of the prosecution. 373 U.S. at 89. This is a strong statement of a significant federal policy mandating criminal defendants be given fair pre-trial discovery. This was not done in this case. The trial court here heard no evidence or argument, and conducted no *in camera* review of the State's evidence. Instead, it denied the discovery motion out of hand, holding that it exceeded the scope of *Brady*, *supra*. This ruling was summarily affirmed by the Supreme Court of Georgia. This is a serious misinterpretation of the law. This Court should review the facts and grant appellants access to exculpatory information and fair pre-trial discovery.

CONCLUSION

This Court has jurisdiction over this appeal pursuant to 28 U.S.C.§1257(2)(1976). The federal questions raised by the appeal are sufficiently important to warrant plenary considerations, and this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

SCHREEDER, WHEELER & FLINT
1600 Candler Building
Atlanta, Georgia 30043-7501
(404) 681-3450

/s/ DAVID H. FLINT

/s/ WARREN O. WHEELER
Counsel of Record

/s/ MARY JO WORKMAN
Counsel for Shepherd
Construction Company, Inc.

Arrington, Rubin, Winter,
Krischner & Goger, P.C.
1210 First National Bank Tower
Atlanta, Georgia 30383
(404) 658-9977

/s/ MARVIN ARRINGTON

/s/ JOHN J. GOGER
Counsel of Record for
Dan P. Shepherd

201 Trust Building
505 North McDonough Street
Decatur, Georgia 30030
(404) 378-3634

/s/ CHARLES H. HYATT

212 Trust Building
505 North McDonough Street
Decatur, Georgia 30030
(404) 377-0411

/s/ DAVID R. ROGERS
Counsel of Record for
J. Harold Shepherd

APPENDIX

In The Supreme Court of Georgia

Decided: Jul 7 1981
Jul 23 181

37387. STATE v. SHEPHERD CONSTRUCTION COMPANY, INC. et al.
37421, 37422. SHEPHERD CONSTRUCTION COMPANY, INC. et al. v. STATE.
37473. ASHLAND-WARREN, INC. v. STATE.

Jordan, Chief Justice.

The State of Georgia indicted the Shepherd Construction Company, Inc., Dan P. Shepherd and J. Harold Shepherd (hereinafter "The Shepherds") on seven counts of "conspiracy in restraint of free and open competition in transactions with the State" (Code Ann. § 26-2308(a)). The indictment charged the Shepherds with conspiring with certain others either to prohibit said others from submitting various road project bids lower than the Shepherds' bids or to prohibit the Shepherd Construction Company, Inc. from submitting various road project bids lower than the others' bids. The Shepherds filed a series of pretrial motions. After holding a hearing, the trial court granted two of the Shepherd's motions and denied the remainder. The State appeals the two motions which the trial court granted and the Shepherds appeal the remaining motions which the trial court denied.

The State indicted Ashland-Warren, Inc. (hereinafter Ashland) and two of its officers on four counts of violating Code Ann. § 26-2308(a). Ashland moved to dismiss the indictment as to itself on the ground that a corporation could not be charged under § 26-2308(a) because the statute provides only punishment by imprisonment. The trial court denied said motion and Ashland appealed to the Court of Appeals. On the motion of Ashland, this Court ordered the appeal transferred to

this Court as a companion to the Shepherd appeal because one of the motions denied by the Shepherd trial court had raised the same issue as the Ashland motion.

I. (a) The State argues that the trial court erred in holding that Code Ann. § 26-2308(a) was unconstitutional because overbroad and facially vague. We agree.

Code Ann. § 26-2308(a) provides that "a person who enters into a contract, combination, or conspiracy in restraint of trade or in restraint of free and open competition in any transaction with the state or any agency thereof, whether said transaction be for goods, materials, or services, shall, upon conviction, be punished by imprisonment for not less than one nor more than five years...."

As defined by the common law, the phrase "restraint of trade" means restraint of competition, *Griffin v. Vandegriff*, 205 Ga. 288, 293 (53 SE2d 345) (1949); *State v. Central of Georgia Railway Company*, 109 Ga. 716 (35 SE 37) (1889); Standard Oil Company of New Jersey v. U. S. 221 U. S. 1, 39, 55, 57, 59-61 (1910), and, the prohibition against "a conspiracy in restraint of trade or in restraint of free and open competition" means simply a prohibition against a conspiracy in unreasonable restraint of competition.
State of Georgia v. Central of Georgia Railway Company, 109 Ga. at 725; National Society of Professional Engineers v. U. S., 435 U. S., 679, 687-90 (1977); Northern Pacific Railway Co. v. U. S. 356 U. S. 1, 4, 5 (1957); Appalachian Coals, Inc. v. U. S., 288 U. S. 344, 359-60 (1932).

A statute is overbroad only if said statute "does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press."

Thornhill V. Alabama 310 U. S. 88, 97 (1939).

The first amendment does not protect speech which is "used in such circumstances and [is] of such a nature as to create a clear and present danger that it will bring about the substantive evils that [the state] has a right to prevent." Schenck v. U. S.,

249 U. S. 49, 52 (1918).

In the present case, Code Ann. § 26-2308(a) bans only that speech by which individuals conspire to create an unreasonable restraint against competition-that is, only that speech which constitues a clear and present danger of a substantive evil which the state may avoid.

Code Ann. § 26-2308(a) is not unconstitutional because overbroad.

A criminal statute is unconstitutionally vague if (1) the statute failed to give full notice to *the defendant* that his conduct was forbidden, see Smith v. Goguen, 415 U. S. 566, 577-78 (1973); (2) the statute failed to give fair notice to *anyone* (including the defendant) that his conduct was forbidden, see, Smith v. Goguen, at 572, 578; or (3) the statute (although it does give fair notice to the defendant) failed to give fair notice to *someone else* that his conduct was forbidden. See Young v. American Mini Theaters, 427 U. S. 50, 58-61 (1975).

A defendant has standing to challenge a statute for failure to give fair notice to someone else only if (1) the conduct for which the someone else could be prosecuted under the challenged statute is expression protected by the First Amendment and (2) the statute's deterrent effect against the other person's performing his protected expressive conduct is both real and substantial. Young v. American Mini Theaters, 427 U. S. at 59-60. Contra Parker v. Levy, 417 U. S. 733, 756-7 (1973)

We find that the deterrent effect of Code Ann. § 26-2308 (a) against someone else's performing his protected expressive conduct is neither real nor substantial. See Bates v. State Bar of Arizona, 433 U. S. 377, 379-81 (1977).

Accordingly, we hold that the Shepherds are without standing to challenge Code Ann. § 26-2308(a) for failure to give fair notice to third parties.

The common law definition of the prohibition contained in Code Ann. § 26-2308 (a) (unreasonable restraint of competition) gave *the Shepherds* more than fair notice that their conduct was prohibited by said statute. U. S. v. U. S. Gypsum Company, 438 U. S. 422, 438-40 (1977); U. S. v. Brighton Building &

Maintenance Co., 598 F.2d 1101, 1105 (1979).

Accordingly, we hold that Code Ann. § 26-2308(a) is not unconstitutionally vague as applied to the Shepherds (and a fortiori, we also hold that said Code Section is not unconstitutionally vague as applied to everybody).

(b) The State argues that the trial court erred in granting the Shepherds' special demurrer to Counts 2 thru 7 of the indictment. Said Counts charged the Shepherds with conspiring with named individuals "and others" or "and another" to restrain free and open competition in transactions with state.

An accused is entitled to an indictment perfect in form as well as substance if he raises the question on special demurrer. See, *State v. Eubanks*, 239 Ga. 483 (238 SE2d 38) (1977). The "perfect" indictment must either name the alleged "other" conspirators or label them as unknown or unindicted. See *Martin v. State*, 115 Ga. 255, 256-7 (41 SE 576) (1902) (Dictum); U. S. v. Briggs, 514 F.2d 794 (1975). See generally *Thompson v. Macon-Bibb County Hospital Authority*, 246 Ga. 777 (273 SE2d 19) (1980).

In the present case, however, the names of the "other" conspirators had been given to the Shepherds by the state in the state's written response to the Shepherds' Brady motion.

For this reason, we hold that the trial court erred in granting the Shepherds' special demurrer to Counts 2 through 7 of the indictment. See, U. S. v. Briggs, 514 F.2d at 800, 805.

II. (a) The Shepherds enumerate as error the trial court's denial of their motion to dismiss Count I of the indictment as barred by the four-year period of limitations in Code Ann. § 26-502(c). The trial court noted the State's allegation in Count I that the offense was unknown until October 20, 1980, and held that, under Code Ann. § 27-601(4),said allegation stated a legally sufficient ground for tolling the otherwise expired four-year period of limitation in Code Ann. § 26-502(c).

The Shepherds note, however, that, under Code Ann. § 26-503(b), the state's allegation does not state a legally sufficient ground for tolling the otherwise expired four-year period of limitations, and, argue that Code Ann. § 26-503(b) impliedly

repealed that part of Code Ann. § 27-601(4) which provides that the period of limitation shall not run so long as the offense is unknown.

Code Ann. § 26-502, 503, and 504, effective July 1, 1969, track the provisions of Code Ann. § 27-601 (Cobb, 838, 842).

Code Ann. § 26-503, however, in tracking that part of Code Ann. §27-601 which provides that "[No] limitation shall run so long as the offender or offense is unknown," states only that no limitation shall run so long as "the person committing the crime or crimes is unknown . . . ."

Accordingly, we hold that Code Ann. §26-503 impliedly repealed that part of Code Ann. §27-601 which provides that no limitation shall run so long as the offense is unknown, and that the trial court erred in denying the Shepherds' motion to dismiss Count I of the indictment. See *Ezzard v. State*, 229 Ga. 465, 467-68 (192 SE2d 374) (1972).

(b) The Shepherd Construction Co., Inc. and Ashland-Warren Inc. argue that their respective trial courts erred in holding that a corporation could be indicted under Code Ann. §26-2308(a).

Code Ann. §26-2308(a) provides that a person who enters into a conspiracy in restraint of free and open competition in any transactions with the state "shall, upon conviction, be punished by imprisonment for not less than one nor more than five years."

Section 26-401(1) of the 1968 Criminal Code [of which §26-2308(a) is a part] defines the word "person" to include a "corporation", and § 26-803(a) of that Code provides: "A corporation may be prosecuted for the act or omission constituting a crime if, but only if: . . . The commission of the crime is authorized, requested, commanded performed or recklessly tolerated by the board of directors or by a managerial official who is acting within the scope of his employment in behalf of the corporation." Thus the General Assembly clearly provided that the 1968 Criminal Code would apply to corporations as prescribed in §26-803. If the General Assembly had intended that corporations be criminally responsible only for those

crimes on which fines were authorized, it certainly could have said so. It didn't. On the contrary, the General Assembly provided that corporations could be prosecuted for crimes authorized or performed by the board of directions or a managerial official acting within the scope of his employmewnt in behalf of the corporation.

In order to carry out the clear legislative intent that a corporation be held responsible for its crimes we must look to other provisions of law enacted by the General Assembly. Code Ann. §§277-2502 and 27-2529 (as amended), when read together, provide that the judge fixing sentence shall prescribe a determinate sentence for a specific number of years within the limits set by law, may probate a noncapital felony sentence upon such terms as he deems proper, and may impose a fine upon the convicted party not to exceed $10,000 (or the fine fixed by law, whichever is greater). As was said in *Southern Railway Co. v. State*, 125 Ga. 287, 289 (54 SE 160) (1906). "While a corporation may not be imprisoned, it may be fined, and the fine enforced by levy on its property."

The defendants argue that probation is an act of leniency, and that under our law probation and payment of a fine cannot be imposed unless a sentence of confinement can first be imposed and then suspended. This technical argument leads to "corporate immunity" for serious crimes and "corporate accountability" for less serious crimes (those for which fines can be imposed; e.g., misdemeanors, where the fine shall not exceed $1000, Code Ann. §27-2506). Unlike the defendants, we do not consider a $10,000 fine to be an act of leniency. Moreover, it is illogial to assume that the General Assembly intended for corporations to be held responsible for minor crimes but not responsible for major ones.

In order to effectuate the clear intent of the General Assembly, we find that pursuant to Code §26-803(a) a corporation can be prosecuted for violating the law, and that a court may sentence a corporation to serve a term for years (even though such sentence be incapable of enforcement) and may suspend that sentence and impose a fine. Code Ann. §§27-2502 and 27-2529.

(c) The Shepherds filed a motion for discovery praying for an order compelling the State to disclose *Brady* materials. Following a hearing, the trial court denied said motion. The shepherds complain that the trial court erred in not conducting an in-camera inspection of the State's file and in not sealing the materials so inspected.

The Shepherds did not make a motion either for an in-camera inspection or to have the materials so inspected sealed. The present enumeration of error is therefore without merit. See *Hamby v. State*, 243 Ga. 339, 341 (253 SE2d 759) (1979); *McGuire v. State*, 238 Ga. 247, 248 (232 SE2d 243) (1977).

(d) Having reviewed the Shepherds' remaining enumerations of error and the record relevant thereto, we hold that each of the remaining enumerations of error is without merit.

Judgement in 37387 reversed. All the Justices concur, except Undercofler and Smith, JJ., who dissent to Division I(a) and the judgment of reversal. Marshall, J., not participating.

Judgment in 37421 and 37422 affirmed in part and reversed in part. All the Justices concur, except Hill, P.J., and Gregory, J., who dissent to Division II(a) and the judgment of reversal. Marshall, J., not participating.

Judgment in 37473 affirmed. All the Justices concur, except Undercofler and Smith, JJ., who dissent to Division II(b) and the judgment of affirmance. Marshall, J., not participating.

37387. STATE v. SHEPHERD CONSTRUCTION COMPANY, INC.
et al.
37421, 37422. SHEPHERD CONSTRUCTION COMPANY, INC.,
et al. v. STATE.
37473. ASHLAND-WARREN, INC. v. STATE.

UNDERCOFLER, Justice, dissenting to division 1 (a) and the judgement in Case No. 37387.

I must agree with the trial judge that Code Ann. § 26-2308 (a) is unconstitutional because facially vague. It makes criminal the restraint of free and open competition in a transaction with the State. However, restraint of free and open competition is not defined and it is not the judiciary's prerogative to define it and thereby establish a crime. This is a legislative function and responsibility. Some respectable authority even questions whether the phrase is capable of definition. Thus, persons must guess whether their business practices involve them in a transaction with the State and whether these practices are legitimate or criminal. Our constitution demands an identifiable offense before a person can be convicted and incarcerated. The statute fails to meet that standard.

I am authorized to state that Mr. Justice Smith joins in this dissent.

In The Supreme Court of Georgia

37387. STATE v. SHEPHERD CONSTRUCTION COMPANY, INC., et al.
37421. SHEPHERD CONSTRUCTION COMPANY, INC., et al v. STATE.
37422. SHEPHERD CONSTRUCTION COMPANY, INC., et al v. STATE.
37473. ASHLAND-WARREN, INC. v. STATE.

GREGORY, Justice, dissenting.

I respectfully dissent to Division II(a) of the majority opinion.

As to Division II(a), the majority opinion holds the State's allegation that the offense was unknown until October 20, 1980 is insufficient to toll the running of the statute of limitations. My view is that the tolling statute includes that period of time when the offense is unknown. The statute provides for tolling of the period of time in which "the person committing the crime or crimes is unknown . . ." Code Ann. § 26-503(b).

If the crime is unknown the person committing the crime must necessarily be unknown. It is not the knowledge of a person as an individual but the knowledge of a person as the offender which relates in a rational way to the tolling of the statue.

I am authorized to state that presiding Justice Hill joins in this dissent as to Division II(a).

(The dissent to Division II(b) and the judgment of affirmance is at A30.)

SUPREME COURT OF GEORGIA

ATLANTA, July 30, 1980

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Shepherd Construction Co., Inc., et al. v. The State

Upon consideration of the Motion for Rehearing filed in this case, it is ordered that it be hereby denied. All the Justices concur, except Undercofler and Smith, JJ., dissent. Marshall, J., not participating.

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Joline B. Williams, Clerk

SUPREME COURT OF GEORGIA

ATLANTA, July 30, 1981

The Honorable Supreme Court met pursuant to adjourment. The following order was passed:

Shepherd Construction Co., Inc., et al. v. The State

Upon consideration of the Motion for Rehearing filed in this case, it is ordered that it be hereby denied. All the Justices concur, except Undercofler and Smith, JJ., dissent. Marshall, J., not participating.

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Joline B. Williams, Clerk

In The Supreme Court of Georgia

Decided: July 7, 1981

37387. STATE v. SHEPHERD CONSTRUCTION COMPANY, INC.
37421, 37422. SHEPHERD CONSTRUCTION COMPANY, INC. et al. v. STATE.
37473. ASHLAND-WARREN, INC. v. STATE.

Jordan, Chief Justice.

The State of Georgia indicted the Shepherd Construction Company, Inc., Dan P. Shepherd and J. Harold Shepherd (hereinafter "The Shepherds") on seven counts of "conspiracy in restraint of free and open competition in transactions with the State" (Code Ann. §26-2308(a)). The indictment charged the Shepherds with conspiring with certain others ether to prohibit said others from submitting various road project bids lower than the Sheperds' bids or to prohibit the Shepherd Construction Company, Inc. from submitting various road project bids lower than the others' bids. The Shepherds filed a series of pretrail motions. After holding a hearing, the trial court granted two of the Shepherd's motions and denied the remainder. The State appeals the two motions which the trial court granted and the Shepherds appeal the remaining motions which the trial court denied.

The State indicted Ashland-Warren, Inc. (hereinafter Ashland) and two of its officers on four counts of violating Code Ann. §26-2308(a). Ashland moved to dismiss the indictment as to itself on the ground that a corporation could not be charged under §26-2308(a) because the statute provides only punishment by imprisonment. The trial court denied said motion and Ashland appealed to the Court of Appeals. On the motion of Ashland, this Court ordered the appeal transferred to this Court as a companion to the Shepherd appeal because one of the motions denied by the Shepherd trial court had raised the same issue as the Ashland motion.

I. (a) The State argues that the trial court erred in holding that Code Ann. §26-2308(a) was unconstitutional because overbroad and facially vague. We agree.

Code Ann. §26-2308(a) provides that "a person who enters into a contract, combination, or conspiracy in restraint of trade or in restraint of free and open competition in any transaction with the state or any agency thereof, whether said transaction be for goods, materials, or services, shall, upon conviction, be punished by imprisonment for not less than one nor more than than five years..."

As defined by the common law, the phrase "restraint of trade" means restraint of competition, *Griffin v. Vandegriff*, 205 Ga. 288, 293 (53 SE2d 345) (1949); *State v. Central of Georgia Railway Company*, 109 Ga. 716 (35 SE 37) (1889); Standard Oil Company of New Jersey v. U.S. 221 U.S. 1, 39, 55, 57, 59-61 (1910), and, the prohibition against "a conspiracy in restraiht of trade or in restraint of free and open competition" means simply a prohibition against a conspiracy in unreasonable restraint of competition.
State of Georgia v. Central of Georgia Railway Company, 109 Ga. at 725; National Society of Professional Engineers v. U.S., 435 U.S. 679, 687-90 (1977); Northern Pacific Railway Co. v. U.S., 356 U.S. 1,4,5 (1957); Appalachian Coals, Inc. v. U.S., 288 U.S. 344, 359-60 (1932).

A statute is overbroad only if said statute "does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press."
Thornhill v. Alabama 310 U.S. 88, 97 (1939).

The first amendment does not protect speech which is "used in such circumstances and (is) of such a nature as to create a clear and present danger that it will bring about the substantive evils that (the state) has a right to prevent." Schenck v. U.S., 249 U.S. 49, 52 (1918).

In the present case, Code Ann. §26-2308(a) bans only that speech by which individuals conspe to create an unreasonable

restraint against competition-that is, only that speech which constitutes a clear and present danger of a substantive evil which the state may avoid.

Code Ann. §26-2308(a) is not unconstitutional because overbroad.

A criminal statute is unconstitutionally vague if (1) the statute failed to give full notice to *the defendant* that his conduct was forbidden, see Smith v. Goguen, 415 U.S. 566, 577-78 (1973); (2) the statute failed to give fair notice to *anyone* (including the defendant) that his conduct was forbidden, see, Smith v. Goguen, at 572, 578; or (3) the statute (although it does give fair notice to the defendant) failed to give fair notice to *someone else* that his conduct was forbidden. See Young v. American Mini Theaters, 427 U.S. 50, 58-61 (1975).

A defendant has standing to challenge a statute for failure to give fair notice to someone else only if (1) the conduct for which the someone else could be prosecuted under the challenged statute is expression protected by the First Amendment and (2) the statute's deterrent effect against the other person's performing his protected expressive conduct is both real and substantial. Young v. American Mini Theaters, 427 U.S. at 59-60. Contra Parker v. Levy, 417 U.S. 733, 756-7 (1973).

We find that the deterrent effect of Code Ann. §26-2308(a) against someone else's performing his protected expressive conduct is neither real nor substantial. See *Bates v. State Bar of Arizona*, 433 U.S. 377, 379-81 (1977).

Accordingly, we hold that the Shepherds are without standing to challenge Code Ann. §26-2308(a) for failure to give fair notice to third parties.

The common law definition of the prohibition contained in Code Ann. §26-2308(a) (unreasonable restraint of competition) gave *the Shepherds* more than fair notice that their conduct was prohibited by said statute. U.S. v. U.S. Gypsum Company, 438 U.S. 422, 438-40 (1977); U.S. v. Brighton Building & Maintenance Co, 598 F. 2d 1101, 1105 (1979).

Accordingly, we hold that Code Ann. §26-2308(a) is not unconstitutionally vague as applied to the Shepherds (and, a for-

tiroi, we also hold that said Code Section is not unconstitutionally vague as applied to everybody).

(b) The State argues that the trial court erred in granting the Shepherds' special demurrer to Counts 2 thru 7 of the indictment. Said Counts charged the Shepherds with conspiring with named individuals "and others" or "and another" to restrain free and open competition in transactions with state.

An accused is entitled to an indictment perfect in form as well as substance if he raises the question on special demurrer. See, *State v. Eubanks*, 239 Ga. 483 (238 SE2d 38) (1977). The "perfect" indictment must either name the alleged "other" conspirators or label them as unknown or unindicted. See *Martin v. State*, 115 Ga. 255, 256-7, (41 SE 576) (Dictum); *U.S. v. Briggs*, 514 F.2d 794 (1975). See generally *Thompson v. Macon-Bibb County Hospital Authority*, 246 Ga. 777 (273 SE2d 19) (1980).

In the present case, however, the names of the "other" conspirators had been given to the Shepherds by the state in the state's written response to the Sheperd's Brady motion.

For this reason, we hold that the trial court erred in granting the Shepherd's special demurrer to Counts 2 through 7 of the indictment. See, U.S. v. Briggs, 514 F.2d at 800, 805.

II. (a) The Shepherds enumerate as error the trial court's denial of their motion to dismiss Count I of the indictment as barred by the four-year period of limitations in Code Ann. §26-502(c). The trial court noted the State's allegation in Count I that the offense was unknown until October 20, 1980, and, held that, under Code Ann. §27-601(4), said allegation stated a legally sufficient ground for tolling the otherwise expired four-year period of limitation in Code Ann. §26-502(c).

The Shepherds note, however, that, under Code Ann. §26-503(b), the state's allegation does not state a legally sufficient ground for tolling the otherwise expired four-year period of limitations, and, argue that Code Ann. §26-503(b) impliedly repealed that part of Code Ann. §27-601(4) which provides that the period of limitation shall not run so long as the offense is unknown.

Code Ann. § 26-502, 503, and 504, effective July 1, 1969, track the provisions of Code Ann. § 27-601 (Cobb, 838, 842).

Code Ann. § 26-503, however, in tracking that part of Code Ann. §27-601 which provides that "[No] limitation shall run so long as the offender or offense is unknown," states only that no limitation shall run so long as "the person committing the crime or crimes is unknown . . . ."

Accordingly, we hold that Code Ann. §26-503 impliedly repealed that part of Code Ann. §27-601 which provides that no limitation shall run so long as the offense is unknown, and that the trial court erred in denying the Shepherds' motion to dismiss Count I of the indictment. See *Ezzard v. State*, 229 Ga. 465, 467-68 (192 SE2d 374) (1972).

(b) The Shepherd Construction Co., Inc. and Ashland-Warren Inc. argue that their respective trial courts erred in holding that a corporation could be indicted under Code Ann. §26-2308(a). We agree and reverse.

"The power to create crimes and to prescribe punishment therefor is legislative," *Johnson v. State*, 169 Ga. 814, 817 (152 SE2d 76) (1929), and "criminal statutes must be strictly construed against the State . . . ." *Knight v. State*, 243 Ga. 770, 775 (257 SE2d 182) (1979).

Code Ann. § 26-2308(a) provides that a person who enters into a conspiracy in restraint of free and open competition in any transactions with the state "shall, upon conviction, be punished by imprisonment for not less than one nor more than five years."

A corporation cannot be indicted under a criminal statute which provides only corporal punishment (death or imprisonment). See, *Southern Railway Co. v. State*, 125 Ga. 287, 289 (54 SE 160) (1906); State v. Willard, 54 So2d 183, 185 (1951).

Accordingly, we hold that a corporation cannot be indicted under Code Ann. § 26-2308(a). See *Hill v. State*, 53 Ga. 125 (1874).

The State argues, however, that, when construed with Code Ann. § 27-2529, Code Ann. § 26-2308(a) provides, as lawful sentences, both imprisonment and a fine, and, that, therefore,

corporations can be indicted under the latter statute.

Construing Code Ann. § 27-2529 with Code Ann. § 27-2502, the former statute authorizes a fine, not as a lawful sentence for a violation of Code Ann. §26-2308(a), but as a condition precedent to a stay of execution of the only lawful sentence provided for in Code Ann. § 26-2308(a) - imprisonment.

(c) The Shepherds filed a motion for discovery praying for an order compelling the State to disclose *Brady* materials. Following a hearing, the trial court denied said motion. The Shepherds complain that the trial court erred in not conducting an in-camera inspection of the State's file and in not sealing the materials so inspected.

The Shepherds did not make a motion either for an in-camera inspection or to have the materials so inspected sealed. The present enumeration of error is therefor without merit. See *Hamby v. State*, 243 Ga. 339, 341 (253 SE2d 759) (1979); *McGuire v. State*, 238 Ga. 247, 248 (232 SE2d 243) (1977).

(d) Having reviewed the Shepherds' remaining enumerations of error and the record relevant thereto, we hold that each of the remaining enumerations of error is without merit.

Judgment in 37387 reversed. All the Justices concur, except Undercofler and Smith, JJ., who dissent to Division I(a) and the judgment of reversal. Marshall, J., not participating.

Judgment in 37421 and 37422 affirmed in part and reversed in part. All the Justices concur, except Hill, P.J., and Gregory, J., who dissent to Divisions II(a) and (b) and the judgment of reversal. Marshall, J., not participating.

Judgment in 37473 reversed. All the Justices concur, except Hill, P.J., and Gregory, J., who dissent to Division II(b) and the judgment of reversal. Marshall, J., not participating.

37387. STATE v. SHEPHERD CONSTRUCTION COMPANY, INC. et al.
37421, 37422. SHEPHERD CONSTRUCTION COMPANY, INC., et al. v. STATE.
37473. ASHLAND-WARREN, INC. v. STATE.

UNDERCOFLER, Justice, dissenting to division 1 (a) and the judgment in Case No. 37387.

I must agree with the trial judge that Code Ann. §26-2308 (a) is unconstitutional because facially vague. It makes criminal the restraint of free and open competion in a transaction with the State. However, restraint of free and open competition is not defined and it is not the judiciary prerogative to define it and thereby establish a crime. This is a legislative function and responsibility. Some respectable authority even questions whether the phrase is capable of definition. Thus, persons must guess whether their business practices involve them in a transaction with the State and whether these practices are legitimate or criminal. Our constitution demands an identifiable offense before a person can be convicted and incarcerated. The statute fails to meet that standard.

SUPREME COURT OF GEORGIA

Atlanta, July 23, 1981

The Honorable Supreme Court met pursuant to adjournment.
The following order was passed:

The State v. Shepherd Construction Co., Inc., et al.

Upon consideration of the Motion for Rehearing filed in this case, it is ordered that it be hereby denied. All the Justices concur, except Undercofler and Smith, JJ., dissent. Marshall, J., not participating.

SUPREME COURT OF THE STATE OF GEORGIA,
Clerk's Office, Atlanta,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/Joline B. Williams, Clerk.

SUPREME COURT OF GEORGIA

Atlanta, August 12, 1981

The Honorable Supreme Court met pursuant to adjournment.

By Jordan, C.J.

The following direction was given:

THE STATE V. SHEPHERD CONSTRUCTION CO., INC., ET AL.

Upon consideration of the motion for a stay of this court's remittitur in order that an appeal or an application for certiorari may be filed in the Supreme Court of the United States to obtain a review of this court's judgment rendered in this case on 7-7-81 such motion is hereby granted, subject to the following conditions:

(1) The clerk of this court is directed to withhold the transmittal of such remittitur to the trial court for ninety days from the date of this court's judgment.

(2) The clerk of this court is directed to transmit such remittitur to the trial court not later than the ninety-fifth day from the date of this court's judgment, provided that the clerk shall continue to withhold the transmittal of such remittitur if the clerk is notified in writing that an appeal or application for certiorari has been timely filed in the Supreme Court of the United States. Upon the timely filing of such appeal or application in the Supreme Court of the United States, the clerk is directed to withhold the transmittal of such remittitur until the final disposition of the case by that Court.

/s/Robert H. Jordan,
Chief Justice

SUPREME COURT OF THE STATE OF GEORGIA,
Clerk's Office, Atlanta,

Witness my signature and the sail of said court hereto affixed the day and year last above written.

Clerk

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA	:	
	:	
v.	:	CRIMINAL
	:	INDICTMENT
SHEPHERD CONSTRUCTION	:	
COMPANY, INC.,	:	NO. A 52695
DAN P. SHEPHERD and	:	
J. HAROLD SHEPHERD	:	

ORDER

The defendants having moved the Court to dismiss the indictment herein on the grounds that Ga. Laws 1968, pp. 1249, 1308 [Ga. Code Ann. § 26-2308(a)] is unconstitutional under both the Fourteenth Amendment to the United States Constitution and Article I, Section I, Paragraph I of the Constitution of Georgia of 1976 (Ga. Code Ann. § 2-101), the Court, having considered the briefs and argument of counsel, finds that the statute's term "conspiracy in restraint of free and open competition" is overly broad and unconstitutionally vague in that said term has no meaning at common law, is not defined by common understanding and practice and does not apprise the defendants or the public of the proscribed conduct within the intendment of the statute.

The Court expresses the belief that the General Assembly, in passage of the statute, intended to proscribe the conduct alleged in the indictment but the Court finds the statute to be unconstitutional on its face without application of the statute to the conduct alleged in the indictment.

The indictment is therefore dismissed.

SO ORDERED this 3rd day of February, 1981, at 8:50 A.M.

/s/FRANK M. ELDRIDGE, JUDGE
SUPERIOR COURT OF FULTON COUNTY,
GEORGIA

IN THE SUPERIOR COURT FOR THE COUNTY OF FULTON STATE OF GEORGIA

STATE OF GEORGIA, Plaintiff)	)	
vs.	)	INDICTMENT
	)	NO½ A-52695
SHEPHERD CONSTRUCTION CO., INC., DAN B. SHEPHERD, J. HAROLD SHEPHERD, Defendants)	)	

ORDER

The Court hereby rules upon all motions filed of record on February 2, 1981; the Court deems those that were not orally argued at the time of hearing that oral argument on said motion was waived and the Court rules based upon the motion and supporting brief:

1.

PLES IN BAR AND MOTION TO DISMISS COUNT I OF THE INDICTMENT AS BEING OUTSIDE OF THE APPLICABLE STATUTE OF LIMITATIONS.

The Court denies said motion in that Georgia Laws 1249, 1266 (Ga. Code Ann. §§26-502, 26-503) must be construed *in pari materia* with Cobb, 838, 842 (Ga. Code Ann. 27-601, 30 P.C.) and said statutes are not in conflict but are complementary; it is fundamental to the commencement of the running of a statute of limitations that there be knowledge of the commission of a crime by either the victim which is imputable to the state of knowledge by the state of such commission of a crime;

2.

DEFENDANTS' DEMURRERS

Paragraphs 1, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, and 40 are denied. Paragraphs 4, 5, 6 and 7 set out no violation of the Federal Constitution or the Georgia Constitution and are hereby denied.

3.

PLEA ON CERTAIN MATTERS ENUMERATED BELOW AND MOTION TO QUASH OR DISMISS THE INDICTMENT

The Court denies demurrers in paragraphs 2 and 5, 6; the Court denies the motion as to paragraph 4 in that Georgia Laws 1968, pp. 1249, 1308 (Ga. Code Ann. §26-2308(a)) in that the statute applies to "persons" which includes artificial entities which may be punished by fine and by an order of restitution and that it was the intent of the General Assembly to include all natural and artificial entities within such act; the Court grants the motion to quash the indictment as prayed in paragraph 3 for failure to set forth all conspirators in counts 2 through 7 instead of stating unknown co-conspirators which harmed said defendants in not putting them on notice of the alleged parties to the conspiracy;

4.

PLEA IN ABATEMENT REGARDING DEFECTIVE INDICTMENT DUE TO SUMMARIZATION OF GRAND JURY WITNESS TESTIMONY, IMPROPER SELECTION, IMPANELMENT, VOTING AND ATTENDANCE OF GRAND JURY AND DUAL AUTHORITY OF SPECIAL ASSISTANT ATTORNEY

GENERAL

The Court denies each and every motion contained therein.

5.

MOTION TO DISQUALIFY
SPECIAL PROSECUTORS

The Court denies said motion.

6.

DEFENDANTS' MOTION TO COMPEL STATE TO FURNISH A TRANSCRIPT OF THE PROCEEDINGS OF THE FULTON COUNTY GRAND JURY

The Court denies said motion in that said matters are secret and privileged and the facts and circumstances of this case do not warrant such discovery.

7.

MOTION FOR PRELIMINARY HEARING

The Court denies said motion and finds that failure to hold a preliminary hearing is not a violation of any constitutional right even though it is a critical stage of the investigation because there was no arrest prior to indictment and that there is no right of preliminary hearing after an indictment.

8.

MOTIONS TO SEVER COUNTS AND MOTION TO COMPEL ELECTION OF COUNTS OF THE INDICTMENT

The Court denies said motions on the grounds that such conspiracy on each count are part of a common scheme or design and a common nature of the conduct within the meaning of *Haisman v. State*, 242 Ga. 896, 900(2) (1978); *Moment v. State*, No. 60755, Ga. App. (1981).

9.

MOTION FOR INDIVIDUAL VOIR DIRE AND SEQUESTRATION OF JURORS DURING VOIR DIRE

The Court, in the exercise of its sound discretion, denies said motion in that said case has not had such pretrial publicity or notoriety as to warrant individual voir dire and said individual voir dire and sequestration of jurors would be disruptive of the orderly trial of the case and the denial of such motion does not abridge any rights of the Defendants.

10.

DEFENDANTS' MOTION FOR DISCOVERY OF MATTERS RELATING TO THE PRE-INDICTMENT PHASE OF THE CASE

Said motion is denied.

11.

MOTION FOR DISCOVERY AND TO COMPEL DISCLOSURE

Said motion is denied and seeks matters outside the ambit of a "Brady" or "Jenks" motion and beyond the scope of discovery under Georgia Law.

12.

MOTION TO CAUSE WITNESSES TO CONFER WITH DEFENDANTS' ATTORNEYS

The Court will order that the Attorney General inform each witness that the defense counsel have a right to talk to such witnessdes but that each such witness has a right to refuse to talk to defense counsel and that the State can not bar such attempt to confer by defense counsel;

13.

REQUEST FOR ADDITIONAL JURY STRIKES

The Court denies said motion in that each defendant is not hostile to the other and has no conflict with the other defendants.

The Court determines that the grant and denial of the foregoing motions are of such grave importance to the State and to the Defendants in the prosecution of this case that immediate appellate review is warranted and the Court further certifies that the issues raised by said motions are of great importance to other pending litigation and although the court has ruled the statute upon which said indictment was based is unconstitutionally vague, a reversal of said ruling would put the foregoing motions in issue again.

SO ORDERED this 3rd day of February, 1981 at 8:45 A.M.

/s/ Frank M. Eldridge, Judge
Fulton Superior Court
Atlanta Judicial Circuit

IN THE SUPREME COURT

STATE OF GEORGIA

SHEPHERD CONSTRUCTION COMPANY, INC., DAN P. SHEPHERD, and J. HAROLD SHEPHERD,	)	
Cross-Appellants,	)	
VS.	)	CASE NUMBERS 37421 and 37422
STATE OF GEORGIA,	)	
Cross-Appellee,	)	
STATE OF GEORGIA,	)	
Appellant,	)	
VS.	)	CASE NUMBER 37387
SHEPHERD CONSTRUCTION COMPANY, INC., DAN P. SHEPHERD, and J. HAROLD SHEPHERD,	)	
Appellees.	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Shepherd Construction Company, Inc., Dan P. Shepherd and J. Harold Shepherd hereby appeal to the Supreme Court of the United States from the decision, order and final judgment of the Supreme Court of Georgia entered in

the above-captioned cases on July 7, 1981, and revised July 23, 1981, with rehearing devised on July 23, 1981 in case number 37387 and on July 30, 1981 in case numbers 37421 and 37422.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

This the 21st day of September, 1981.

SCHREEDER, WHEELER & FLINT
1600 Candler Building
Atlanta, Georgia 30043-7501
(404) 681-3450

/s/ DAVID H. FLINT

/s/ WARREN O. WHEELER
Attorneys for Shepherd Construction Co., Inc.

ARRINGTON, RUBIN, WINTER, KRISCHER & GOGER, P.C.
1210 First National Bank Tower
Atlanta, Georgia 30383
(404) 658-9977

/s/ MARVIN S. ARRINGTON

/s/ JOHN J. GOGER
Attorneys for Dan P. Shepherd

201 Trust Building
505 North McDonough Street
Decatur, Georgia 30030
(404) 378-3634

/s/ CHARLES H. HYATT

212 Trust Building
505 North McDonough Street
Decatur, Georgia 30030
(404) 377-0411

/s/ DAVID R. ROGERS
Attorneys for J. Harold Shepherd

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter and the Attorney General for the State of Georgia, pursuant to Rule 28(c) of the Rules of the Supreme Court of the United States, with a copy of "Notice of Appeal to the Supreme Court of the United States" by delivering in the United States Mail a copy of the same in a properly addressed envelope to:

Michael J. Bowers
Attorney General for the State of Georgia
132 State Judicial Building
Atlanta, Georgia 30334

G. Thomas Davis, Esq.
Special Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334

with sufficient postage to assure delivery.

This the 21st day of September, 1981,

/s/ DAVID H. FLINT
Attorney for Shepherd
Construction Co., Inc.

SCHREEDER, WHEELER & FLINT
1600 Candler Building
Atlanta, Georgia 30043-7501
(404) 681-3450

37387. STATE v. SHEPHERD CONSTRUCTION COMPANY, INC. et al.
37421, 37422. SHEPHERD CONSTRUCTION COMPANY, INC. et al. v. STATE
37473. ASHLAND-WARREN, INC. v. STATE

SMITH, Justice dissenting to Division II(b).

I, too, believe that corporations *should* be accountable under a criminal bid-rigging statute. However, the determination that corporations *are* to be held accountable is for the legislature. The majority's holding that the legislature *has* made such a determination can only be described as legal fantasy.

Code Ann. §26-2308(a) provides *only* for corporal punishment – "imprisonment for not less than one nor more than five years." "[I]t is . . . well settled that where the only penalty provided for a criminal offense is a corporal punishment, that is where an offender can be punished only by death or imprisonment, a corporate defendant is not liable to criminal prosecution. This result proceeds from the impossibility of subjecting the artificial person of a corporation to a corporal penalty." Annot., Corporations Liability to Criminal Prosecution as Affected by Punishment or Penalty Imposed, 80 A.L.R.3d 1220, 1222 (1977); *Southern Railway Co. v. State*, 125 Ga. 287 (54 SE 160) (1906); *State ex rel. Losey v. Willard*, 54 So 2d 183 (Fla. 1951); *People v. Duncan*, 363 Ill. 495, 2 N E 2d 705 (1936); *State ex rel. Kropf v. Gilbert*, 213 Wis. 196, 251 N W 478 (1933). Presumably our legislature was cognizant of an almost universally recognized legal principle when it enacted Code Ann. §26-2308. See *Brookins v. State*, 221 Ga. 181, 190 (144 SE2d 83) (1965).

I find it inconceivable that Code Ann. §27-2502 and 27-2509 were intended to provide the basic sentence for violation of the bid-rigging statute. "The manifest purpose of Code Ann. §27-2502 is merely to enforce those other provisions which fix the punishment for an offense . . ." *Lackey v. State*, 116 Ga. App. 789, 790 (159 SE2d 188)(1967). Code Ann. §27-2529 simply authorizes the imposition of a fine *where the basic sentence has*

been probated. It is obvious that, under this statutory scheme, a basic sentence, capable of being imposed and probated, must exist apart from the fine. However, the only lawful sentence provided in Code Ann. §26-2308 is imprisonment, and, as the majority recognizes, such a sentence cannot be imposed on a corporation. *Southern Railway Co. v. State*, supra. The majority's resort to legal fiction (i.e. probation of a sentence which cannot be imposed, followed by imposition of a fine incident to the probation) in order to reach a particular result seriously undermines the previously unassailable rule that "criminal statutes must be strictly construed against the state." *Knight v. The State*, 243 Ga. 770, 775 (257 SE2d 182) (1975).[1]

Although the plain language of the two statutes should be dispositive of the "issue" (*Hill v. State*, 53 Ga. 125, 127 (1874); *Balkcom v. Heptinstall*, 152 Ga. App. 532 (263 SE2d 275) (1979)), it must also be noted that there is absolutely nothing in the legislative history of Code Ann. §§27-2502 and 27-2529 to support the majority's conclusion that these provisions were intended to provide the basic sentence for violation of the bid-rigging statute. The two sections were enacted during different legislative sessions than Code Ann. §26-2803, and the statements of purpose preceding the enactments make no reference to it.

Manifestly, the majority has chosen to ignore a number of established legal principles in Division II(b) of its opinion. I must respectfully dissent.

---

[1]Even the legal fiction employed by the majority does not stand scrutiny. Under Code Ann. §27-2502, the authority of the trial court to probate a sentence is discretionary. The fine authorized by Code Ann. §27-2529 is also discretionary. Thus, the very existence of a sentence capable of being imposed against a corporation for violation of Code Ann. §26-2308(a) will, in every case, depend upon a post facto exercise of discretion by the trial court. This hardly comports with my understanding of a sentence "prescribed" for an offense. See *Johnson v. State*, 169 Ga. 814, 817 (152 SE2d 76) (1929).

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter and the Attorney General for the State of Georgia, pursuant to Rule 28(c) of the Rules of the Supreme Court of the United States,with "Jurisdictional Statement" by delivering a copy of the same in a properly addressed envelope to:

Michael J. Bowers
Attorney General for the State of Georgia
132 State Judicial Building
Atlanta, Georgia 30334

G. Thomas Davis, Esq.
Special Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334

with sufficient postage to assure delivery.

This the 5th day of October, 1981.

/s/DAVID H. FLINT
Attorney for Shepherd
Construction Co., Inc.

SCHREEDER, WHEELER & FLINT
1600 Candler Building
Atlanta, Georgia 30043-7501
(404) 681-3450

Motion to Dismiss or Affirm

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NO. 81-669

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SHEPHERD CONSTRUCTION CO., INC.,
DAN P. SHEPHERD AND J. HAROLD SHEPHERD,
Appellants,

v.

STATE OF GEORGIA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

MOTION TO DISMISS OR TO AFFIRM

132 State Judicial Bldg.
Atlanta, Georgia 30334
(404) 656-2704

MICHAEL J. BOWERS
Attorney General

2000 Cain Tower
229 Peachtree Street
Atlanta, Georgia 30334
(404) 588-0505

G. THOMAS DAVIS
Special Assistant
Attorney General

MICHAEL E. SULLIVAN
Special Assistant
Attorney General

THOMAS D. WATRY
Assistant Attorney General

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NO. 81-669

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SHEPHERD CONSTRUCTION CO., INC.,
DAN P. SHEPHERD AND J. HAROLD SHEPHERD,
Appellants,

v.

STATE OF GEORGIA,
Appellee.

ON APPEAL FROM THE
SUPREME COURT OF GEORGIA

MOTION TO DISMISS OR TO AFFIRM

The Appellee respectfully moves the Court to dismiss the appeal herein or, in the alternative to affirm the judgment of the Supreme Court of Georgia on the grounds that this Court does not have jurisdiction in that this appeal is not from a final judgment and does not present substantial federal questions.

QUESTIONS PRESENTED

1. Whether the judgment appealed from is a final judgment in that this case has not gone to trial and does not threaten any important federal policy.

2. Whether Ga. Code § 26-2308(a) which provides that any person who enters into a contract, combination or

conspiracy in restraint of trade or in restraint of free and open competition in a transaction with the State, and which requires an overt act thereafter is constitutional in that the term free and open competition, has meaning at common law and under the facts alleged presented adequate notice to Appellants.

3. Whether the court was correct in not requiring oral argument on each and every motion and in not conducting an in-camera inspection of the State's file when there was no motion for such an inspection.

STATEMENT OF THE CASE

On November 21, 1980, the Grand Jury of Fulton County, Georgia, returned an indictment against the Appellants, Shepherd Construction Co., Inc., Dan P. Shepherd, and J. Harold Shepherd, charging them collectively with seven counts of conspiracy in restraint of free and open competition in transactions with the State. The charged offenses constitute felonies under the provisions of Ga. Laws 1968, pp. 1249, 1308 [Ga. Code § 26-2308(a)].

The gravamen of the indictment is that the Shepherds conspired with others, named and unnamed, to rig bids on State Department of Transportation road projects. The dates of the conspiracies ranged from May, 1975 through October, 1979.

The Shepherds were arraigned on the described charges on January 16, 1981, and each entered a plea of not guilty. Prior to arraignment, they filed numerous motions, demurrers, pleas, and discovery requests. The trial court instructed counsel to appear on February 2, 1981 for oral argument on all of the pending pleadings. In addition, the trial court set the date for trial for April 6, 1981.

Among the pleadings filed by the Shepherds were a "Special and General Demurrer and Motion to Quash and/or Dismiss the Indictment" which had as their basis the contention that Ga. Code § 26-2308(a) is unconstitutionally vague. Also filed were a Motion for Discovery which resembled a set of interrogatories and Requests for Production of Documents and a Request for *Brady* Materials.

The State filed written responses to each of the Shepherds' motions, demurrers, pleas and discovery requests on January 29, 1981. In its response to a request for information potentially governed by *Brady v. Maryland*, the State supplied, in writing, a list of persons and corporations which, to its information and belief, were co-conspirators with the Shepherds on each count of the indictment. This information was provided nine weeks in advance of the trial date set by the Court. The State also supplied copies of all plea agreements and known prior convictions of any witnesses it expected to call at trial. Such material was all the potential *Brady* material in the possession of the State.

The scheduled trial did not occur. The trial court, by order dated February 3, 1981, found that Ga. Code § 26-2308(a) is unconstitutional on its face without application of the statute to the conduct alleged in the indictment. By further order of the same date, the trial court ruled on the other motions, demurrers, pleas and discovery requests previously filed by the Shepherds.

The State appealed the decision holding the statute unconstitutional to the Georgia Supreme Court. The Shepherds brought a cross-appeal raising a number of issues including the trial court's ruling denying further discovery on the motions pending before it and denying oral

argument on some of the motions. The Supreme Court of Georgia held that Ga. Code § 26-2308(a) is not unconstitutionally vague or overbroad in an opinion issued on July 7, 1981. As to the Shepherds' request for *Brady* materials, the Georgia Supreme Court held that the Shepherds had not made a motion either for an in-camera inspection or to have the materials so inspected sealed. The Court reasoned that under Georgia law, having made no such motion, the Shepherds were not entitled to an independent inspection of the State's file by the trial judge. As to the denial of oral argument on some of the motions, the court simply noted that such an enumeration of error was without merit. The Shepherds had not been able to cite any authority to support their argument on the enumeration.

A. THE JUDGMENT OF THE SUPREME COURT OF GEORGIA IS NOT "FINAL" FOR PURPOSES OF PRE-TRIAL REVIEW IN THIS COURT.

The State agrees that the preliminary issue for this Court's consideration is whether the case presents for review a final judgment in accordance with 28 U.S.C. § 1257(2). Likewise, the State recognizes that the Court has tended to give a practical or pragmatic construction to the finality requirement. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945). This flexibility is not without bounds, however, and is just as importantly limited by considerations of judicial economy and comity. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). *See*, Note, *The Finality Rule For Supreme Court Review Of State Court Orders*, 91 Harv.L.Rev. 1004 (1978).

This Court's most comprehensive discussion of the concept of finality, the exceptions to that concept, as well

as the limitations upon those exceptions, appears in *Cox Broadcasting Corp. v. Cohn, supra.* In *Cox*, the Court categorized the exceptions to the finality rule thus far recognized and consolidated additional cases into a newly articulated fourth exception. As will be discussed, it is clearly only this fourth category of cases which relates to the case at bar.

The first of the *Cox* categories includes cases in which the state court decision on the federal question would be conclusive on that question, that is, the outcome of any later proceedings was pre-ordained due to the effect that the federal question determination had on the remaining issues in the case. For example, this exception would apply where defendants have no defense to the action and *liability* is therefore concluded by the state court decision on the federal question. *See*, Note, 91 Harv.L.Rev., at 1017, n. 71, *cases cited.* This category clearly does not apply to the case at bar as a determination in the state courts that a state criminal statute is constitutionally sound has not here concluded the issue of criminal liability. The Shepherds have not been tried, have not conceded criminal liability, and might yet prevail on the factual question of guilt.

The second category of cases in *Cox* is similarly inapplicable, as it includes cases in which the federal question will certainly survive for later review regardless of the outcome of further proceedings, absent settlement. *Cox, supra*, 420 U.S., at 480, 481. *See, New York v. Cathedral Academy*, 434 U.S. 125 (1977). Since acquittal remains a possible outcome at trial in the case at bar, this category does not apply.

The third category of *Cox* cases are those in which for one reason or another later review of the federal question

cannot be had, as where applicable procedural laws guarantee that the question would not be later presented by the parties to the Court. *Cox, supra*, 420 U.S., at 481, 482. It has been noted that this category inevitably applies only to situations in which a state is for procedural or other reasons barred from seeking review of certain judicial determinations. *See*, Note, 91 Harv.L.Rev. at 1022, 1023. It could not apply to the Shepherds, who, if convicted, could certainly present the same question to the Court in a post-conviction appeal, along with other federal and non-federal questions which may have arisen in the interim at trial.

Therefore, it is evident that the only remaining category of cases from *Cox* to be considered is the fourth category. The elements of that class of cases which the Court deems sufficient to justify an exception to the finality rule are: (1) there is a final decision on the federal question in the state court of last resort; (2) the party seeking review in the Supreme Court might prevail on the merits or other grounds in further proceedings below, and therefore the federal question might not be preserved for later determination in this Court; (3) a reversal of the state court decision on the federal question would not simply control further proceedings below, but would actually *preclude* them; and (4) refusal to immediately review the federal question would leave standing a State Supreme Court decision on that question which would threaten to seriously erode an important federal policy until the Court eventually gets another opportunity elsewhere to review the question. *Cox, supra*, 420 U.S., at 482, *et seq.*

The first three prongs of this test would clearly apply to the case at bar. The Georgia Supreme Court has issued a final decision that Ga. Code § 26-2308(a) is constitu-

tionally sound (although Appellants have yet to be tried thereunder), a reversal on that question would preclude any further proceedings on the indictments, and Appellants might well prevail on other grounds in further proceedings below, thereby rendering later review of the federal question unnecessary.

The key question regarding the applicability of the fourth class of *Cox* cases to the case at bar is therefore whether this Court's refusal to review the constitutionality of Ga. Code § 26-2308(a), prior to Appellants' trial, would leave standing a state court decision which would threaten to seriously erode an important federal policy.

In order to answer this question, the Court must first decide two preliminary questions: (1) what, *if any*, important federal policy is involved; and (2) does the decision of the Georgia Supreme Court below threaten to erode the policy, if left standing?

The Court in *Cox* answered the first question only by way of example, and provided no clear definition. *See*, Note, 91 Harv.L.Rev., at 1025. In *Construction Labors v. Curry*, 371 U.S. 542 (1963), the state court decision involved a finding of state jurisdiction over a labor dispute (upholding an injunction) in a manner which in the absence of immediate review ". . . would seriously erode *the national labor policy* . . ." of N.L.R.B. preemption of jurisdiction over labor disputes. 371 U.S., at 550 (emphasis added). The Court also noted that the union had no defense to the action on the merits. 420 U.S., at 483. Therefore, *Construction Labors* could have been treated as a category I case.

In *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963), also cited by the *Cox* majority as an example of a category IV case, the important federal policy noted was

that of federal venue statutes which served to determine prior to trial in which state court a case should be tried.

Finally, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), involved a state court decision, which if left standing unreviewed, the Court noted would certainly " '. . . further harm the operation of a *free press*'." 420 U.S., at 484, 485, and n. 12 (emphasis added). *See also, Village Voice, Inc. v. Rinaldi*, 423 U.S. 883 (1975) (Douglas, J., dissenting from denial of certiorari).

Using these examples, the question is what such important federal policy is threatened with erosion by the Georgia Supreme Court's finding that Ga. Code § 26-2308(a) is constitutionally sound? That section (as applied by the indictment in this case) provides that "[a] person who enters into a . . . conspiracy in restraint of trade or in restraint of free and open competition in any transaction with the State or any agency thereof . . ." is guilty of a felony. (Ga. Laws 1968, p. 1249, 1308.)

There is certainly no "important federal policy" which *favors or protects* those who conspire in restraint of trade or in restraint of free and open competition. Likewise, there is no federal policy which favors restraint of trade or restraint of free and open competition, in *whatever* manner accomplished.

To the contrary, unlike *Construction Labors, supra, Mercantile National Bank, supra*, and *Miami Herald Publishing Company, supra*, the only relevant important federal policy, that of the federal antitrust statutes, is in fact *strengthened and served* by the Georgia Supreme Court's decision, if affected at all. *See generally, Hudson Distributors v. Eli Lilly*, 377 U.S. 386 (1964). In *Miami Herald Publishing Company, supra*, the free press in Florida would have been "chilled" by the state court

decision, regardless of which party prevailed on the merits. In the case at bar, it is only those who "conspire . . . in restraint of trade or in restraint of free and open competition . . ." in unscrupulous dealings with the State, who are "chilled" and *this* type of chilling *comports* with important federal policy; it certainly does not erode it.

As noted above, just as pragmatism and practicality created the *Cox* exception to the finality rule, so should they also *limit* the expansion of exceptions to that rule. It has been noted that there are several policy reasons for avoiding limitless expansion of the exceptions to the finality rule, principle amongst which are considerations of judicial economy and comity. *Republic Gas Company v. Oklahoma*, 334 U.S. 62, 67 (1948); *Radio Station WOW, Inc. v. Johnson, supra. Cf. Younger v. Harris*, 401 U.S. 37 (1971). *See*, Note, 91 Harv.L.Rev., at pp. 1006, 1013, 1019, 1021, 1026.

Further, it has long been recognized that courts should (1) decide appeals on the narrowest possible grounds, and (2) avoid deciding cases on federal constitutional grounds when non-federal state grounds may arise upon trial. *Burton v. United States*, 196 U.S. 283, 295 (1905); *Liverpool, N.Y. & P.S.S. Company v. Emigration Commissioners*, 113 U.S. 33, 39 (1885); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936) (Brandeis, J., concurring); *Republic Gas Company, supra; Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). Such opportunities to later review this case on narrower grounds are all the more likely to arise in this action which has not yet involved any trial on the merits.

The civil cases cited in *Cox, supra*, are all of the nature in which additional federal constitutional questions were extremely unlikely to arise after review and trial. In

criminal actions such as the case at bar, this cannot so readily be assumed, it in fact being likely upon possible conviction there would be raised numerous additional federal constitutional questions eventually needing review. In that after possible conviction both these additional federal questions *and* narrower state law questions will likely appear, both judicial economy and comity would be best served by this Court's refusal to review the question now raised prior to a trial on the merits. *Republic Natural Gas, supra*, 334 U.S., at 70-72. Perhaps this is the reason that with three exceptions, the cases cited throughout *Cox* are civil cases. In the three criminal cases cited, other considerations controlled the Court's decisions, such as the nonreviewability issue in *California v. Stewart*, 384 U.S. 436, 498 (1966), the lack of any remaining defense in *Mills v. Alabama*, 384 U.S. 214 (1966), and the certain survival of the federal issue in *Brady v. Maryland*, 373 U.S. 83 (1963).

None of these features exist in this case, and for this reason the State submits that the normal rule of finality applied to criminal cases should apply here, *i.e.*, criminal constitutional questions are normally considered final only when *sentence* is imposed. *Berman v. United States*, 302 U.S. 211, 212 (1937); *Parr v. United States*, 351 U.S. 513 (1956).

Therefore, since there is no important federal policy which the decision below threatens to erode, and due further to the likelihood that other federal constitutional questions and narrower state law questions may arise from a possible conviction in further proceedings, judicial economy and comity would best be served by the Court's refusal to find the judgment of the Supreme Court of Georgia to be final. *Cox, supra*, and 28 U.S.C. § 1257(2).

B. GEORGIA LAWS 1968, P. 1249, 1308 [GA. CODE § 26-2308(a)] IS NOT UNCONSTITUTIONALLY VAGUE.

The elementary concern with any criminal statute must be whether those to whom the statute is directed can understand it sufficiently to conform their behavior accordingly. The Supreme Court of Georgia held that Ga. Code § 26-2308(a) and its prohibition "gave the Shepherds more than fair notice that their conduct was prohibited by said statute." (A-3.) Finding that the Shepherds were forewarned by the statute, the Supreme Court of Georgia held that Ga. Code § 26-2308(a) is not unconstitutionally vague.

Because the Shepherds had more than fair notice that their conduct was prohibited by the statute, the decisions of this Court vitiate their appeal on this ground. "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy*, 417 U.S. 733, 755-756 (1974). A statute was not held void for vagueness when the person challenging it had sufficient warning that his own conduct was unlawful. *United States v. Mazurie*, 419 U.S. 544, 553 (1975).

The Shepherds did not challenge the Georgia statute on First Amendment grounds. "It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States v. Mazurie, supra*, at 550.

The Shepherds transact substantial business with the State of Georgia. They assert: "The Company works mostly on projects for the Georgia Department of Transportation." (Page 3 of Appellants' brief.) For them to contend that they did not realize that it would be for-

bidden to enter a conspiracy to predetermine, among the conspirators, the low bidder on State road projects, committing thereafter an overt act in furtherance of the conspiracy, insults ordinary intelligence. Such activity is conclusively presumed illegal without inquiry as to the reasonableness of it or the alleged business justification for it.

Justice Black defined the doctrine of *per se* illegality in *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 4, and 5 (1958): ". . . there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. . . . Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing. . . ." *United States v. Flom*, 558 F.2d 1179, 1183 (5th Cir. 1977) holds: "Conspiracies between firms to submit collusive, noncompetitive, rigged bids are *per se* violations of the statute. . . . An agreement that one company would not submit a bid lower than another is price fixing of the simplest kind and is a *per se* violation." *United States v. Brighton Building and Maintenance Company*, 598 F.2d 1101, 1106 (7th Cir. 1979): ". . . It is as if the Sherman Act read: 'An agreement to rig bids is illegal'."

Georgia Code § 26-2308(a) demands "free and open competition" in transactions with the State. The statute provides:

> "A person who enters into a contract, combination, or conspiracy *in restraint of trade or in restraint of free and open competition* in any transaction with the State or any agency thereof, whether said transaction

> be for goods, materials, or services, shall, upon conviction, be punished by imprisonment for not less than one nor more than five years. The crime of conspiracy in restraint of free and open competition in transactions with the State shall be complete when the contract, combination, or conspiracy is effected, and an overt act in furtherance thereof has been committed." (Emphasis added.)

The first sentence of the Sherman Act, 15 U.S.C. § 1, states: "Every contract, combination in the form of trust or otherwise, or conspiracy, *in restraint of trade* or commerce among the several States, or with foreign nations, is declared to be illegal. . . ." (Emphasis added.)

Georgia Code § 26-2308(a) is more stringent than the Sherman Act because:

(1) it requires that the transaction be one with the State; and

(2) it requires that an overt act in furtherance of the conspiracy be committed.

The gravamen of the Shepherds' attack throughout has been that they cannot understand what a conspiracy in restraint of free and open competition is. The Constitution does not require a precise statutory definition for every essential term used in a statute, but merely that the terms used have a meaning which would give a person of ordinary intelligence fair notice that his conduct is forbidden by the statute. *United States v. Harriss*, 347 U.S. 612 (1954).

Statutes like the Sherman Act or Ga. Code § 26-2308(a) must inherently be to at least some degree flexible, general and adaptable. "As a charter of freedom, the Act [Sherman Act] has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might either

work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape." *Appalachian Coals Inc. v. U.S.*, 288 U.S. 344, 359-60 (1933).

Justice Black appropriately described the purpose of the Act in *Northern Pacific R. Co. v. United States*, *supra*, at 4, 5 (1957): "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving *free and unfettered competition* as the rule of trade." (Emphasis added.)

To conspire to "restrain trade" (Sherman Act) or to conspire to "restrain trade" or "restrain free and open competition in any transaction with the State" means simply that the charter of economic liberty, suggested by Justice Black, has been violated.

The phrase "free and open competition" has been judicially used in the context of being an established national policy. *United States v. General Petroleum Corporation*, 33 F.Supp. 95, 97 (D.C.S.D. Calif. 1940) cited as a basis for its decision: ". . . the established national policy of prohibiting or treating as illegal all contracts or combination of individuals or corporations *substantially restrictive of free competition*. . . ." (Emphasis added.)

The Shepherds have strained to inject doubt as to the meaning of words where no doubt would be felt by the normal reader. This Court refused to indulge in such straining in *United States v. Powell*, 423 U.S. 87 (1975), and should refuse here. This Court, reversing the Court of Appeals, held a federal firearms statute constitutional by examining it in light of the facts of the case. "While doubts as to the applicability of the language in marginal fact situations may be conceived, we think that the statute gave respondent adequate warning that her mailing of a

22-inch-long sawed-off shotgun was a criminal offense." *Powell, supra*, at p. 93.

Construction firms and individuals who transact business with a State, its citizens and taxpayers are peculiarly situated. The unique situation of those who aspire to do business with a State, together with the peculiar nature of the offense charged, render of themselves sufficient constitutional warning of proscribed conduct. "[T]he argument of vagueness, to warn men of their conduct, ignores the nature of the criminal act itself and the notice necessarily given from this." *Screws v. United States*, 325 U.S. 91, 129 (1945).

How could the Shepherds know that their conspiracies to rig bids and fix prices would restrain free and open competition? They could know so because such activity is *per se* illegal and, as stated in *United States v. Gillen*, 599 F.2d 541, 544 (3rd Cir. 1979): "Price-fixing is an area of the law in which people can or ought to be able to predict the legal consequences of their actions. Price fixers do not even approach 'the gray zone of socially acceptable and economically justifiable business conduct. . . .' "

As in *Gillen*, the Shepherds knew full well or should have known the legal consequences of conspiring as they did. The Supreme Court of Georgia found them more than fairly warned.

C. GEORGIA LAWS 1968, P. 1249, 1308 [GA. CODE § 26-2308(a)] IS NOT UNCONSTITUTIONALLY OVERBROAD.

The Shepherds argue that the statute allows punishment based solely on the content of their speech. Their argument ignores:

(1) that in the trial court, they did not challenge the statute on First Amendment grounds; and

(2) that the statute expressly requires as an element of the offense the commission of an overt act in furtherance of the conspiracy.

Georgia Code § 26-2308(a) does not proscribe speech. It proscribes a defined conspiracy but only after an overt act in furtherance of the conspiracy has been committed. The Shepherds' argument that the statute condemns constitutionally protected commercial speech ignores the overt act requirement. Requiring the overt act as an element of the offense removes Ga. Code § 26-2308(a) from overbreadth concerns. Because of the requirement, the prohibition of the statute does not sweep within its ambit activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The Shepherds neglect to argue how the condemning of a conspiracy with an overt act in furtherance thereof is condemning the exercise of freedom of speech.

The good faith flow of truthful and legitimate commercial information is not threatened by a statute which proscribes activities only after an overt act toward the commission of the crime is committed. Certainly, this Court has never regarded the Sherman Act, which has no overt act requirement, as unconstitutionally overbroad.

The Shepherds argue that there is no proof that they intended to violate the statute. Under Georgia law, intention is a question of fact reserved for the trier of fact, Ga. Code § 26-605. The Shepherds have not yet been tried and the State has not yet been afforded the opportunity of proving that their activities were intended and proscribed.

D. THE TRIAL COURT WAS CORRECT IN NOT REQUIRING ORAL ARGUMENT ON EACH AND EVERY MOTION AND IN NOT CONDUCTING AN IN-CAMERA INSPECTION OF THE STATE'S FILE WHEN THERE WAS NO MOTION FOR SUCH AN INSPECTION.

Under this heading, the Shepherds make the novel argument that apparently the law requires a superior court judge to have oral argument on all pre-trial motions filed by a criminal defendant. It may be noted that the Shepherds have cited no authority to support that proposition.

As the record below discloses, the Shepherds filed numerous pre-trial motions and pleas, many of which were duplicitous, or to some extent over-lapping. The Shepherds in addition filed briefs attempting to support their motions and pleas and the State filed responsive briefs. In those instances where the Shepherds made factual allegations, usually unsupported even by verification, the State replied with a verified response. In short, the trial court had before it full argument on each of the questions it had to decide.

There is no basis for the statement in Shepherds' Jurisdictional Statement, p. 21, that the court gave "no consideration" to most of their motions and filings. From a review of the orders entered by the court, the opposite appears to be the case.

Next the Shepherds contend that the trial court erred by denying their "Motion for Discovery." At the outset on this point, an inaccuracy asserted by the Shepherds needs to be corrected. Appellants state that at the time their motion was heard before the trial court, they had

received from the State only a list of witnesses and a statement that *Brady* material would be supplied when and if discovered. To the contrary, prior to the hearing the State furnished to the Shepherds, in response to their *Brady* request, plea agreements and known prior convictions of any witnesses it expected to call at trial. Said information represented all the material in the possession of the State which the State deemed to be favorable to the accused on the questions of guilt or innocence.

The Shepherds never moved the trial court for an *in camera* review as was noted by the Georgia Supreme Court at A-7. In such a situation, the trial court is under no duty to conduct such an inspection. *Hamby v. State*, 243 Ga. 339, 253 S.E.2d 759 (1979).

The "Motion for Discovery" as filed by the Shepherds was more in the nature of a set of interrogatories and request for production of documents, and was clearly far beyond the scope of the requirements of *Brady v. Maryland, supra*. The Supreme Court was correct in deciding the matter as it did.

CONCLUSION

For the reasons stated herein, this appeal should be either dismissed or affirmed.

Respectfully submitted,

132 State Judicial Bldg.
Atlanta, Georgia 30334
(404) 656-2704

/s/ MICHAEL J. BOWERS
Attorney General

2000 Cain Tower
229 Peachtree St., N.E.
Atlanta, Georgia 30303
(404) 588-0505

/s/ G. THOMAS DAVIS
Special Assistant
Attorney General

/s/ MICHAEL E. SULLIVAN
Special Assistant
Attorney General

/s/ THOMAS D. WATRY
Assistant Attorney General

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing parties in the foregoing matter, pursuant to Rule 28(c) of the Rules of the Supreme Court of the United States, with copies of "Motion to Dismiss or to Affirm" by delivering copies of the same in a properly addressed envelope to:

David H. Flint, Esq.
Warren O. Wheeler, Esq.
Mary Jo Workman, Esq.
1600 Candler Building
Atlanta, Georgia 30043-7501

Marvin Arrington, Esq.
John J. Goger, Esq.
1210 First National Bank Tower
Atlanta, Georgia 30383

Charles H. Hyatt, Esq.
201 Trust Building
505 North McDonough Street
Decatur, Georgia 30030

David R. Rogers, Esq.
212 Trust Building
505 North McDonough Street
Decatur, Georgia 30030,

with sufficient postage for first class delivery.

This 2nd day of November, 1981.

/s/ G. THOMAS DAVIS
Special Assistant
Attorney General

2000 Cain Tower
229 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 588-0505